TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 149

GREAT NORTHERN RAILWAY COMPANY,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 9, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

No. 9624

United States

Circuit Court of Appeals

For the Ninth Circuit.

RAYMOND J. MacDONALD, as Trustee of an express trust for others,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

W. H. HOOVER,
J. E. CORETTE, JR.,
L. V. KETTER,
All of Butte, Montana.
Attorneys for Appellant Raymond J. MacDonald, as Trustee.

F. G. DORETY,
St. Paul, Minnesota,
WEIR, CLIFT & BENNETT,
Helena, Montana.
Attorneys for Appellant Great Northern Railway Company.

JOHN B. TANSIL,
United States Attorney,
ROY F. ALLEN,
Assistant United States Attorney,
Billings, Montana.
and
AUBREY LAWRENCE,
Special Assistant to the Attorney General,
Washington, D. C.
Attorneys for Appellee, United States of America. [1*]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.

No. 32.

Civil.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

RAYMOND J. MacDONALD,
as Trustee of an Express Trust for Others,

Intervener,

Be it remembered, that on March 23, 1939, the plaintiff filed its complaint herein, which is in the words and figures following, towit: [2]

District Court of the United States
For the District of Montana
Great Falls Division.

No. 32 Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

COMPLAINT

Now comes the above-named plaintiff, the United States of America, and files this its complaint by its undersigned solicitor, the duly appointed, qualified and acting United States Attorney in and for the District of Montana. This suit is brought, filed and prosecuted by the special direction of the Attorney General of the United States and at the request of the Secretary of the Interior of the United States and in its own behalf, and for cause of action alleges:

I.

That the defendant is a railway corporation, organized under the laws of the State of Minnesota for the purpose of operating and maintaining a railway and businesses incident thereto, and that the said Great Northern Railway Company has been at all the times herein involved operating and maintaining a railway, engaged in part in the transportation of goods in interstate commerce.

II.

That jurisdiction is vested in this Court under Revised Statutes, Sections 563, and 629, and amendments thereto, now being Section 41, Title 28, United States Code. [3]

III.

That under the Act of March 3, 1875 (18 Stat. 482), the St. Paul, Minneapolis and Manitoba Railway Company, a railroad corporation, was granted

a right of way through the public lands of the United States. That on the eleventh day of October, 1907, the St. Paul, Minneapolis and Manitoba Railway Company conveyed to the Great Northern Railway all its rights of property, including "various lands granted to it by the United States of America and by the State of Minnesota to aid in the construction of a railroad, hereinbefore described," etc. That the said Great Northern Railway Company is now operating and maintaining a railroad on the right of way over public lands granted to the St. Paul, Minneapolis and Manitoba Railway Company under the Act of March 3, 1875.

IV.

That a portion of said right of way, so granted and now in use by the Great Northern Railway Company in operating and maintaining a railroad, crosses Sections 7, 16, 17 and 18 in Township 33 North, Range 5 West, and Sections 1, 2 and 12 in Township 33 North, Range 6 West, all in Glacier County, State of Montana.

V.

That under the Act of March 3, 1875, the St. Paul, Minneapolis and Manitoba Railway Company or its successor, the Great Northern Railway Company, acquired neither the right to use any portion of said right of way for the purpose of drilling for and removing subsurface oil and minerals, nor any right, title or interest in or to the oil or mineral

deposits underlying the said right of way, but that such oil and minerals remained the property of the United States, and subject to its control and disposition. [4]

VI.

That the defendant, the Great Northern Railway Company, claims and asserts ownership to the oils and minerals underlying its right of way as aforesaid and the right to take and remove the same and is about to and has threatened to use portions of the right of way, crossing the lands hereinbefore described, for the purpose of drilling for and removing subsurface oil.

VII.

That unless the said Great Northern Railway Company, the defendant, be restrained and enjoined from drilling for and removing oil underlying the surface of the right of way hereinbefore described the United States will be deprived of its property and the right thereto and will suffer irreparable injury.

VIII.

That any operation or proceeding for, or the taking of any oil, gas or minerals from the subsurface of the right of way hereinabove described constitutes a violation of the terms and provisions of the said Act of March 3, 1875.

IX.

That no lease has been issued to the defendant, the Great Northern Railway Company under the

Act of May 21, 1930 (46 Stat. 373), to drill upon or remove deposits of oil and gas under the said right of way of the defendant, nor has any application therefor been made.

WHEREFORE, the plaintiff prays that a permanent injunction be issued restraining and enjoining the Great Northern Railway Company from in any manner using the right of way granted, as hereinbefore described, for the purpose of drilling for and removing oil, gas and minerals underlying its right of way except under a lease issued pursuant to the provisions of the said Act of May 21, 1930, and that a permanent [5] injunction issue, restraining the defendant, the Great Northern Railway Company, from drilling for or removing any oil, gas or minerals beneath the surface of its right of way, crossing the lands hereinbefore described, or any other lands granted under the Act of March 3, 1875, and now owned or used by the said defendant except under a lease issued pursuant to the provisions of the said Act of May 21, 1930.

JOHN B. TANSIL,
United States Attorney [6]

United States of America
District of Montana—ss.

John B. Tansil, being first duly sworn, on oath deposes and says:

That he is the duly appointed, qualified and acting Attorney of the United States, in and for the District of Montana, and as such, makes this veri-

fication to the foregoing Complaint; that he has read the said Complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

JOHN B. TANSIL

Subscribed and sworn to before me this 21st day of March, 1939.

(Notarial Seal) ROY F. ALLAN,

Notary Public in and for the District of Montana, residing at Billings, Montana.

My commission expires June 29, 1941.

[Endorsed]: Filed March 23, 1939. [7]

Thereafter, on April 18, 1939, Answer of Great Northern Railway Company, Defendant, was duly filed herein in the words and figures following, to-wit: [8]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant above named and answers the complaint of the plaintiff herein as follows:

I.

Defendant admits the allegations in paragraphs I, II, III, IV, VI and IX of said complaint.

II.

Defendant denies paragraph V of said complaint and each and every allegation therein contained.

III.

Answering paragraph VII of said complaint, defendant admits that unless it is restrained therefrom, it will proceed to drill for and remove the oil underlying the surface of the right of way described in said complaint, but denies that said oil, or any part thereof, is the property of the United States, and denies that the United States will be deprived of any property or that it will suffer any irreparable or other injury as a result of defendant's intended action.

IV.

Defendant denies paragraph VIII of said Complaint, and each and every allegation therein contained. [9]

V.

Further answering said complaint, and as an affirmative defense thereto, defendant alleges that there is oil underlying said right of way of a character and quantity suitable for use as fuel upon defendant's locomotives operated upon its interstate railroad which passes over said right of way, and that it is economically practicable and desirable for defendant to remove said oil and use the same upon its said locomotives, and that defendant will suffer severe loss if restrained or enjoined from so doing.

VI.

Defendant further alleges that said oil has a commercial value substantially in excess of the cost of producing the same, and that if defendant is permitted to remove said oil, it can sell the same com-

mercially for large amounts of money which would be of great value and assistance to defendant in the operation of its railroad.

VII.

Defendant further alleges that the said oil contains volatile portions which can be removed by refinement and used for gasoline and other similar products, leaving a residue which is suitable for locomotive fuel, and that the greatest net proceeds and best economic results can be obtained from said oil by refining the same and by disposing of the more volatile portions commercially and using the residue as fuel oil. [10]

Unless restrained by this Court, defendant intends to and will drill three separate wells upon said right of way. The oil produced from well number one will be sold commercially and the proceeds used in the operation of defendant's railroad. The oil produced from well number two will be refined, the more volatile portions being sold commercially and the residue being used as fuel oil upon defendant's locomotives. The oil produced from well number three will be used in its entirety as fuel oil upon defendant's locomotives.

Wherefore, defendant prays that the complaint herein be dismissed.

T. B. WEIR
Attorney for Defendant,
Helena, Montana

F. G. DORETY,
St. Paul, Minnesota
WEIR, CLIFT & BENNETT,
Helena, Montana.
Of counsel.

(Affidavit of Service attached to Answer omitted)

[Endorsed]: Filed April 18, 1939. [11]

Thereafter, on June 2, 1939, Motion and Notice of Motion for Judgment on the Pleadings was duly filed herein, which is in the words and figures following, towit: [12]

[Title of District Court and Cause.]

NOTICE OF MOTION

The plaintiff moves the Court for judgment in its favor upon all the pleadings and upon all issues in the action. Said motion will be based upon the pleadings and upon the records and files in said action.

JOHN B. TANSIL
United States Attorney
Billings, Montana

To: F. G. Dorety
Attorney for Defendant
St. Paul, Minnesota

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Courtroom....., on the 20th day of June, 1939, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

JOHN B. TANSIL
United States Attorney
Billings, Montana

(Affidavit of Service attached to Notice of Motion omitted)

[Endorsed]: Filed June 2, 1939. [13]

Thereafter, on June 22, 1939, Notice of Motion for Leave to Intervene was duly filed herein by Raymond J. MacDonald, as Trustee of an express trust for others, which is in the words and figures following, towit: [14]

In the District Court of the United States
for the District of Montana
Great Falls Division

No. 32 Civil

UNITED STATES OF AMERICA,
Plaintiff,

v.

GREAT NORTHERN RAILWAY COMPANY,
a corporation,
Defendant,

RAYMOND J. MacDONALD, as Trustee of an Express Trust for Others,

Intervener.

NOTICE OF MOTION FOR LEAVE TO INTERVENE

To: The United States of America, Plaintiff, and Great Northern Railway Company, Defendant, and all persons interested in the above entitled cause.

You, and each of you, will please take notice that on Thursday, June 22nd, 1939, at 10:00 o'clock A. M., in the Court Room of the above entitled Court in the Federal Building at Billings, Montana, the undersigned, Raymond J. MacDonald, as Trustee of an express trust for others, through his undersigned solicitors, will move the above entitled Court for leave to file a Petition in Intervention in the above entitled cause.

A copy of said Petition for Leave to Intervene and of the proposed Complaint in Intervention of Raymond J. MacDonald, as such Trustee, is served upon you, herewith.

W. H. HOOVER
L. V. KETTER
J. E. CORETTE, JR.
Solicitors for Intervener.

[Endorsed]: Filed June 22, 1939. [15]

Thereafter, on June 22, 1939, a Motion and Petition for Leave to Intervene was filed by Raymond J. MacDonald, as Trustee of an Express Trust for Others, which is in the words and figures as follows, towit: [16]

[Title of District Court and Cause.]

MOTION AND PETITION FOR LEAVE TO INTERVENE

Comes Now, Raymond J. MacDonald, as Trustee of an Express Trust for Others, hereinafter sometimes referred to as the "Petitioner", and moves and petitions the above entitled Court for leave and permission to intervene in the above entitled action upon the following grounds:

I.

That jurisdiction is vested in this Court under Revised Statutes, Sections 563, and 629, and amendments thereto, now being Section 41, Title 28, United States Code Annotated.

II.

Petitioner's claim, as hereinafter stated, is in agreement with Plaintiff's claim and contention to the extent that Plaintiff prays that a permanent injunction be issued restraining and enjoining the Great Northern Railway Company from in any way using the right of way which was granted to it by the Act of March 3rd, 1875, for the purpose of drilling for and removing oil, gas and minerals underlying this right of way, and [17] that a permanent

injunction issue restraining the Defendant, the Great Northern Railway Company, from drilling for or removing any oil, gas or minerals beneath the surface of its right of way crossing any part of the SW¼ of Section 17, Township 33 North, Range 5 West, Glacier County, Montana, which is a part of the land described in Plaintiff's Complaint in the above entitled action, but Petitioner's claim is adverse to Plaintiff's contention and claim as to the present ownership of the minerals located underneath the right of way of the Defendant, Great Northern Railway Company, where that right of way crosses the NE¼ of the said SW¼ of said Section 17, Township 33 North, Range 5 West, M. M., Glacier County, Montana. Petitioner's claim is adverse to the claim of the Defendant, Great Northern Railway Company, in that said Defendant and Petitioner each claim title to the oil, gas and minerals underneath the said right of way of the Defendant across the NE¼SW¼ of said Section 17.

III.

That by a declaration of trust in writing, dated September 18th, 1934, and executed by him, the above named intervener stated and declared that he holds the SW¼ of Section 17, Township 33 North, Range 5 West, M. M., Glacier County, Montana, together with 6¼% landowners' royalty of all the oil, gas and other minerals beneath the surface of said premises, in trust for various and numerous named persons and corporations therein, and that all

moneys received by him as royalty payments, or otherwise, for and on account of said lands and royalty interest so held by him in trust, are to be paid to the various and numerous persons mentioned therein as beneficiaries of said trust, after the deduction of reasonable and necessary expenses of the administration of said trust. That said declaration of trust has not been cancelled or terminated, and it is still in [18] full force and effect, and the said intervener, as such trustee, at all times since the date of said declaration of trust, has held, and does yet hold, the aforesaid land, and the said royalty interest, as such trustee.

IV.

That on or about July 11th, 1910, one Lemuel J. Hawkins made homestead entry under the Act of May 20th, 1862, of the Congress of the United States, and Amendments thereto, on the whole of the SW¼ of Section 17, Township 33 North, Range 5 West, M. M., now in Glacier County, Montana, and that thereafter a patent to the whole of said SW¼ of said Section 17 was duly issued and delivered by the United States of America to the said Lemuel J. Hawkins, which patent is dated January 23rd, 1914. That intervener is the successor in interest of the said Lemuel J. Hawkins, the patentee to said SW¼ of said Section 17, except to a 6¼% royalty of the oil, gas and other minerals beneath the surface of said described premises.

V.

That by virtue of said patent, the whole of the 160 acres within the exterior boundary lines of the said SW¼ of said Section 17 was granted to the said patentee, Lemuel J. Hawkins, subject to the right of way of the Defendant, Great Northern Railway Company, over the said NE¼ of said SW¼ of said Section 17. That said patent did not contain any exception or reservation of the oil, gas or other minerals in or under the said SW¼ of Section 17, or any part thereof.

VI.

The Plaintiff and Defendant each claim title to the minerals underlying the right of way of the Defendant over the NE¼ of the said SW¼ of said Section 17, which right of way was granted by the Act of March 3rd, 1875, as alleged in the Complaint. Intervener alleges that neither Plaintiff nor the [19] Defendant is or can be the owner of such oil, gas and other minerals underlying the right of way of the Defendant over the NE¼ of the said SW¼ of said Section 17, and that such oil, gas and other minerals are owned by the intervener herein as the successor in interest of Lemuel J. Hawkins, the patentee of said SW¼ of said Section 17.

VII.

The interest of this Intervener will not be fully and adequately presented to the above entitled Court in the above entitled cause by the Plaintiff and the Defendant therein, and this intervener is so situated

as to be adversely affected by a decision of the above entitled cause, if such a decision were arrived at without the complete and adequate presentation of the interests of this intervener and without the consideration by the Court of those interests.

VIII.

The claim of the intervener involves questions of law which are the same as the questions of law involved in the above entitled cause between the Plaintiff and Defendant therein, and the intervener's claim and the above entitled action between the Plaintiff and the Defendant have questions of law in common. The Intervener is entitled to intervene under the provisions of Rule 24, subsections a and b, of the Rules of Civil Practice for the District Courts of the United States.

IX.

The question of law involved in the above entitled action is whether, under the Railroad Land Grant Right of Way Act of March 3rd, 1875, and acts supplemental thereto and amendatory thereof, title to the minerals underlying right of way so granted are vested:

1st. In the United States, the Plaintiff herein, or [20]

2nd. In the Defendant herein, the Great Northern Railway Company, or

3rd. In this Petitioner, as the successor in interest of a patentee of a subdivision over which the right of way passes.

These questions ought not to be determined by a consideration only of the asserted rights of the Plaintiff and Defendant herein, but should be determined after a consideration of the rights of this intervener and other patentees or their successors in interest who have similar rights to those of this Petitioner, and Petitioner believes that the Plaintiff and the Defendant herein have no reason to stress and will not stress the rights of this Petitioner or of parties similarly situated, and that a full and complete judicial and equitable disposition of the pending case cannot be made without consideration by this Court of the rights of this Petitioner and other persons having similar rights to this Petitioner.

X.

The title of the United States to the minerals underlying the right of way of the Great Northern Railway Company, where that right of way crosses over the said SW¼ of said Section 17, was extinguished by the subsequent Act of the United States in granting, issuing and delivering the patent to Lemuel J. Hawkins, covering the whole of said SW¼ of said Section 17, as hereinbefore set forth.

XI.

That denial of intervention would constitute denial of relief to which this Petitioner is entitled, in that this Petitioner's rights might be lost or substantially affected, if intervention is not allowed by this Court and if the rights of this Petitioner and

of other parties having similar rights are not fully and completely presented to the Court in the above entitled cause. [21]

XII.

Petitioner avers that his interest in the litigation is substantial and that his attempted intervention is made in good faith and in subordination to and in recognition of the main proceeding and expressly recognizes the jurisdiction of this Court therein, and alleges further that no remedy other than the intervention proposed herein is available for protection of Intervener's rights to minerals underlying said railway right of way for the reason that the Plaintiff claims said minerals, and your Petitioner is without statutory authority to litigate or quiet his title against Plaintiff in an independent suit brought for that purpose.

XIII.

Petitioner avers that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties hereto.

XIV.

Petitioner avers that, in the interest of justice and equity and to secure a complete adjudication of the title to minerals underlying its grant under the Act of March 3rd, 1875, Defendant, the Great Northern Railway Company, interposes no objection to the granting by this Court of Petitioner's intervention.

Wherefore, Petitioner prays that this Motion and Petition for Leave and Permission to Intervene in the above entitled action be granted and that this Petitioner's Complaint in Intervention, which is attached hereto, and Intervener's Answer to Plaintiff's Complaint, which is attached hereto, each be ordered filed in the above entitled cause, and that the Defendant, Great Northern Railway Company, be required to answer this Petitioner's said Complaint in Intervention. [22]

Respectfully submitted,

W. H. HOOVER
L. V. KETTER
J. E. CORETTE, JR.
Attorneys for Petitioner

[Endorsed]: Filed June 22, 1939. [23]

Thereafter, on June 22, 1939, Intervener's Complaint in Intervention was filed herein, which is in the words and figures following, towit: [24]

[Title of District Court and Cause.]

INTERVENER'S COMPLAINT IN INTERVENTION

Comes Now the above named Intervener and, by leave of court first had and obtained, for his cause of action against the above named defendant, complains and says:

I.

That the grounds upon which the jurisdiction of this court depends are:

(1) That the court already has jurisdiction, the action in which this intervention is made; having been brought by the United States of America.

(2) That the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000.00, and arises under the laws of the United States and between citizens of different states.

II.

That by a declaration of trust in writing dated September 18, 1934, and executed by him, the above named intervener stated and declared that he holds

[25]

the SW¼ of Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana, together with 6¼% landowners royalty of all the oil, gas, and other minerals beneath the surface of said premises, in trust for various and numerous named persons and corporations therein, and that all monies received by him as royalty payments, or otherwise, for and on account of said lands and royalty interest so held by him in trust, are to be paid to the various and numerous persons mentioned therein as beneficiaries of said trust, after the deduction of reasonable and necessary expenses of the administration of said trust. That said declaration of trust has not been cancelled or terminated, and it is still in full force and effect, and the said intervener, as such trustee, at all times since the

date of said declaration of trust, was held, and does yet hold, the aforesaid land, and the said royalty interest, as such trustee.

III.

That this intervener is a citizen of the State of Montana.

IV.

That the above named defendant is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, with its principal office and place of business at St. Paul, Minnesota.

V.

That under and pursuant to the provisions of the act of March 3, 1875 of the Congress of the United States (18 Revised Stats. 482; Title 43, Sections 934-939, both inclusive, of the United States Code Annotated), the St. Paul, Minneapolis, and Manitoba Railway Company, a railway corporation, predecessor in interest of the above named defendant, Great Northern Railway Company, having theretofore filed with the Secretary of the Interior a copy of its Articles of Incorporation, and due proofs of its organization [26] under the same, did on or about the 23rd day of January, 1891 file with the Register of the Land Office at Helena, Montant, in the District where the land was located, a profile of a certain section of twenty miles of its railroad as it was theretofore located across public lands in said district.

VI.

That said railroad as so located and indicated on said profile crossed the Northeast Quarter of the Southwest Quarter (NE¼SW¼) of Section 17, Township 33 North, Range 5 West, M.M., now in Glacier County, Montana, and other public lands.

VII.

That the construction of said section of railroad was completed, and the same is now a part of the main line of railroad maintained and operated by the above named defendant from St. Paul, Minnesota, to the Pacific Coast.

VIII.

That by virtue of the aforesaid act of Congress and compliance therewith by the said predecessor of the above named defendant, a right of way 100 feet wide on each side of the central line of said railroad as it passed over the public lands hereinbefore described, was granted to said railway company, and the above described lands were by said act required to be thereafter disposed of subject to such right of way.

IX.

That thereafter, to-wit, on or about the 11th day of October, 1907, the said predecessor in interest of the above named defendant, transferred and conveyed to the said defendant all its property, including the said right of way over the lands hereinabove described, and the said defendant, ever since said

date, has maintained and operated its main line of railroad upon its said right of way as it passes over the [27] above described land.

X.

That after the filing of said profile, and after the construction of said section of railroad, to-wit, on or about July 11, 1910, one Lemuel J. Hawkins made homestead entry under the act of May 20, 1862 of the Congress of the United States, and amendments thereof, on the whole of the SW¼ of Section 17, Township 33 North, Range 5 West, M.M., now in Glacier County, Montana, which included the Northeast Quarter (NE¼) of said quarter section over which the said right of way of the defendant passes.

XI.

That thereafter, a patent to the whole of the said SW¼ of said Section 17, Township 33 North, Range 5 West, M.M., was duly issued and delivered by the United States of America to the said entryman, which patent is dated January 23, 1914, and a copy of which is hereto attached and marked Exhibit "A", to which reference is hereby made.

XII.

That by virtue of said patent, the whole of the 160 acres within the exterior boundary lines of the aforesaid quarter section, was granted to the patentee subject to said right of way over the

said Northeast Quarter (NE¼) of said quarter section of said patented land.

XIII.

That said patent did not contain any exception or reservation of the oil, gas, or other minerals in or under the patented lands, or any part thereof, and all the oil, gas, and other minerals therein and thereunder were, by said patent, granted by the United States of America to the said patentee, as a part of said lands, and the said patentee thereby became the owner of, and entitled to the possession of, said oil, gas and other minerals. [28]

XIV.

That thereafter, and while he was still the owner of the aforesaid lands and the oil, gas, and other minerals therein contained, the said patentee died; and such proceedings were had in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Glacier, in the matter of the estate of Lemuel J. Hawkins, deceased, then and therein said court pending, that a Decree of Distribution was duly and regularly made by said court in said matter on the 26th day of January, 1931, by which the above described quarter section of land was distributed to Clissie A. Hawkins, widow of the said Lemuel J. Hawkins, deceased. That a certified copy of said Decree of Distribution was duly recorded in the office of the County Clerk and Recorder of Glacier County, Montana, in Book #1 of Orders and Decrees at page 85.

XV.

That thereafter, and while she was still the owner of said quarter section of land, the said Clissie A. Hawkins made, executed and delivered to Louis B. O'Neill an oil and gas lease covering the whole of said quarter section, and which, by mesne assignments, has been transferred and is now owned and held by Glacier Production Company, a corporation. That said oil and gas lease is dated October 15, 1931 and was recorded in the office of the County Clerk and Recorder of Glacier County, Montana, on June 9, 1932, in Book 3 of Oil and Gas Leases at page 559.

XVI.

That under and by virtue of the terms of said oil and gas lease, the said land was leased for oil and gas mining purposes, for a period of ten (10) years from its date and so long thereafter as oil or gas is produced from the land by the lessee or his assigns, and the lessor reserved a royalty [29] of 1/8th of the oil produced and saved from said land, and a royalty of the market price at the well of 1/8th the gas produced and sold or used off said land or in the manufacfure of gasoline.

XVII.

That the said oil and gas lease is still in force and effect.

XVIII.

That thereafter, by a deed dated May 31st, 1934, and recorded June 4, 1934, in Book 10 of Deeds

at page 267 in the office of the County Clerk and Recorder of Glacier County, Montana, the said Clissie A. Hawkins, who was still then and there the owner of said quarter section of land, subject to said oil and gas lease, conveyed the same and the whole thereof, to Raymond J. MacDonald, Trustee, and intervener herein, subject to said oil and gas lease, but excepting and reserving 6¼% royalty of the oil, gas and all minerals beneath the surface of said described premises.

XIX.

That the intervener now, and at all times since the said conveyance to him, owns the said land, as trustee under the declaration of trust aforesaid, and all the oil, gas, and other minerals therein, except 6¼% royalty, as reserved in said deed by the grantor therein.

XX.

That the above named defendant has no right, title, or interest to or in the oil, gas, and other minerals under or beneath the surface of the part of the said NE¼SW¼ of said Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana, that is within the 200 foot limits of said right of way. [30]

XXI.

That the sum or value of the last mentioned oil, gas, or other minerals exceeds the sum of $3000.00.

XXII.

That the oil and gas, and other minerals, or either of them, beneath the surface of the land within said right of way limits are not a part of defendant's said right of way, and that the same can be withdrawn or extracted therefrom by wells drilled on intervener's said quarter section, but off of said right of way, without injury to said right of way, and without interfering with the use thereof by the defendant for a railroad right of way.

XXIII.

That the defendant, Great Northern Railway Company, claims to be the owner of the oil and gas under or beneath the surface of the part of the said NE¼SW¼ of Section 17, Township 33 North, Range 5 West, M.M., that is within the 200 foot limits of said right of way, and threatens to and will, unless restrained by this court, drill wells thereon and take, extract, remove and appropriate the same to its own use, and threatens so to do, and will deprive this intervener of the same and the royalties to which he is entitled under the oil and gas lease aforesaid, and of his reversionary right in and to said oil and gas, if such lease should become forfeited or cancelled, all to his irreparable damage and injury.

XXIV.

That intervener has no plain, speedy, or adequate remedy in the ordinary course of the law.

Wherefore, intervener prays that the defendant, Great Northern Railway Company, be required to answer this complaint in intervention; that a permanent injunction be issued, restraining and enjoining it from, in any manner, drilling for [31] oil, gas, or other minerals on its right of way as it crosses the lands hereinbefore described, and from extracting, removing, and appropriating to its own use the said oil, gas, and other minerals; and that the intervener have and recover of the said defendant its costs and disbursements herein incurred.

W. H. HOOVER
L. V. KETTER
J. E. CORETTE, JR.
Attorneys for Intervener [32]

"EXHIBIT A"

3547

Transcribed from Teton County Records. Patent Record 6-G page 124 compared.
Great Falls 013718

The United States of America,
To All to Whom These Presents Shall Come, Greetings:

Whereas, A Certificate of the Register of the Land Office at Great Falls, Montana has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settler on the Public Domain" and the acts supplemental

thereto, the claim of Lemuel J. Hawkins has been established and duly consummated, in conformity to law, for the southwest quarter of Section seventeen in Township thirty-three north of Range five west of the Montana Meridian, Montana, containing one hundred sixty acres, according to the Official Plat of the Survey of the said Land, returned to the General Land Office of the Surveyor-General;

Now Know Ye, That there is, therefore, granted by the United States unto the said claimant the tract of land above described; To Have and To Hold the said tract of land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In Testimony Whereof, I, Woodrow Wilson President of the United States of America, have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. Given under my hand, at the City of Washington, the Twenty-third day of January in the year of our Lord one thousand nine hundred and

fourteen and of the Independence of the United States the one hundred and thirty-eighth.

By the President:

WOODROW WILSON

By M. P. LEROY,

Secretary. [33]

[General Land Office Seal] L. Q. C. LAMAR

Recorder of the General Land Office

Recorded: Patent Number 379868

Filed for record Feb. 1 A. D. 1918 at 9 o'clock A.M. (No. 69161)

E. C. GARRETT,

County Recorder.

By Deputy

McS.

State of Montana,
County of Glacier—ss.

I, J. Lee Anderson, County Clerk and Ex-Officio Recorder in and for said County of Glacier, State of Montana, do hereby certify that the above and foregoing is a full, true and correct copy and the whole thereof, of an original patent filed in my office on the 1st day of February A.D. 1918 at 9:00 o'clock A. M., and now remaining therein as Document No. 69161.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at Cut Bank,

Montana, this 3rd day of June A.D. 1939.

[Seal] J. LEE ANDERSON,
County Recorder.
By FLORENCE WALFORD,
Deputy

[Endorsed]: Filed June 22, 1939. [34]

Thereafter, on June 22, 1939, Intervener's Answer to Plaintiff's Complaint was duly filed herein, which is in the words and figures following, towit: [35]

[Title of District Court and Cause.]

INTERVENER'S ANSWER TO PLAINTIFF'S COMPLAINT

Comes Now the above named Intervener and, by leave of Court first had and obtained, for his answer to the Complaint of the above named Plaintiff in the above entitled action, answers and says:

I.

That by a Declaration of Trust, in writing, dated September 18th, 1934, and executed by him, the above named Intervener stated and declared that he holds the SW¼ of Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana, together with 6¼% landowner's royalty of all the oil, gas and other minerals beneath the surface of said premises, in trust for various and numerous named persons and corporations therein, and that all moneys received by him as royalty

payments, or otherwise, for and on account of said lands and royalty interest so held by him in trust, are to be paid to the various and numerous persons mentioned therein as beneficiaries of said trust, after the deduction of reasonable and necessary expenses [36] of the administration of said Trust. That said Declaration of Trust has not been cancelled or terminated, and it is still in full force and effect, and the said Intervener, as such Trustee, at all times since the date of said Declaration of Trust, has held, and does yet hold, the aforesaid land, and the said royalty interest, as such Trustee.

II.

That the NE¼ of said SW¼ of Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana, is a part of the lands over which it is alleged in Plaintiff's Complaint that the right of way of the Defendant, Great Northern Railway Company, passes and which it is alleged therein was granted to its predecessor in interest under the Act of Congress of March 3rd, 1875, (18 Revised Stats. 482; Title 43, Sections 934-939, both inclusive, of the U. S. C. A.).

III.

That the Intervener admits the allegations of paragraphs I, II, III, IV, V, VI, VIII, and IX of said Complaint.

IV.

Answering Paragraph VII of said Complaint, the Intervener denies that the oil underlying the

surface of the right of way as it crosses the above described lands owned by this Intervener, is the property of the Plaintiff, that it has any right thereto, or will suffer irreparable injury if the Defendant railroad company is not restrained or enjoined from drilling for and removing the oil underlying the surface of said right of way as it crosses the property of the Intervener above described.

Further Answering Said Complaint, and as an affirmative and separate defense thereto, the Intervener alleges:

1.

That by a Declaration of Trust, in writing, dated September 18th, 1934, and executed by him, the above named In- [37] tervener stated and declared that he holds the said Southwest Quarter (SW¼) of Section 17, Township 33 North, Range 5 West, M. M., Glacier County, Montana, together with 6¼% landowner's royalty of all the oil, gas, and other minerals beneath the surface of said premises, in trust for various and numerous persons and corporations named therein, and that all moneys received by him as royalty payments or otherwise for and on account of said lands and royalty interest so held by him in trust are to be paid to the various and numerous persons named therein, as beneficiaries of said Trust, after the deduction of reasonable and necessary expenses of the administration of said Trust. That said Declaration of Trust

has not been cancelled or terminated, is still in full force and effect, and the said Intervener, as such Trustee, has at all times since the date of said Declaration of Trust held, and does yet hold, the aforesaid land, and the said royalty interest, as such Trustee, and as such is the owner thereof.

2.

That under and pursuant to the provisions of the Act of March 3rd, 1875 of the Congress of the United States (18 Revised Stats. 482; Title 43, Sections 934-939, both inclusive, of the United States Code Annotated), the St. Paul, Minneapolis, and Manitoba Railway Company, a railroad corporation, predecessor in interest of the above named Defendant, Great Northern Railway Company, having theretofore filed with the Secretary of the Interior a copy of its Articles of Incorporation, and due proofs of its organization under the same, did on or about the 23rd day of January, 1891, file with the Register of the Land Office at Helena, Montana, in the District where the land was located, a profile of a certain section of twenty (20) miles of its railroad as it was theretofore located across public lands in said district. [38]

3.

That said railroad, as so located and indicated on said profile, crossed the Northeast Quarter of the Southwest Quarter (NE¼SW¼) of Section 17, Township 33 North, Range 5 West, M. M., now in Glacier County, Montana, and other public lands.

4.

That the construction of said section of railroad was completed, and the same is now a part of the main line of railroad maintained and operated by the above named defendant from St. Paul, Minnesota, to the Pacific Coast.

5.

That by virtue of the aforesaid Act of Congress and compliance therewith by the said predecessor of the above named Defendant, a right of way 100 feet wide on each side of the central line of said railroad as it passes over the public lands hereinbefore described, was granted to said Railway Company, and the above described lands were by said Act required to be thereafter disposed of, subject to such right of way.

6.

That thereafter, to-wit: on or about the 11th day of October, 1907, the said predecessor in interest of the above named Defendant, transferred and conveyed to the said Defendant all its property, including the said right of way over the lands hereinabove described, and the said Defendant, ever since said date, has maintained and operated its main line of railroad upon its said right of way as it passes over the above described land.

7.

That after the filing of said profile, and after the construction of said section of railroad, to-wit:

on or [39] about July 11th, 1910, one Lemuel J. Hawkins made homestead entry under the Act of May 20th, 1862, of the Congress of the United States, and amendments thereto, on the whole of the SW¼ of Section 17, Township 33 North, Range 5 West, M. M., now in Glacier County, Montana, which included the Northeast Quarter (NE¼) of said quarter section over which the said right of way of the Defendant passes.

8.

That thereafter, a patent to the whole of the said SW¼ of said Section 17, Township 33 North, Range 5 West, M. M., was duly issued and delivered by the United States of America to the said entryman, which patent is dated January 23rd, 1914, and a copy of which is hereto attached and marked Exhibit "A", to which reference is hereby made.

9.

That by virtue of said patent, the whole of the 160 acres within the exterior boundary lines of the aforesaid quarter section was granted to the patentee subject to said right of way over the said Northeast Quarter (NE¼) of said quarter section of said patented land.

10.

That said patent did not contain any exception or reservation of the oil, gas, or other minerals in or under the patented lands, or any part thereof, and all the oil, gas and other minerals therein and thereunder were by said patent granted by the United

States of America to the said patentee, as a part of said lands, and the said patentee thereby became the owner and entitled to the possession of said oil, gas and other minerals, and the Plaintiff, since the issuance of said patent, has not had, nor has it now, any right, title or interest therein. [40]

11.

That thereafter, and while he was still the owner of the aforesaid lands and the oil, gas and other minerals therein contained, the said patentee died, and such proceedings were had in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Glacier, in the matter of the Estate of Lemuel J. Hawkins, Deceased, then and there in said court pending, that a Decree of Distribution was duly and regularly made by said Court in said matter on the 26th day of January, 1931, by which the above described quarter section of land was distributed to Clissie A. Hawkins, widow of the said Lemuel J. Hawkins, Deceased. That a certified copy of said Decree of Distribution was duly recorded in the Office of the County Clerk and Recorder of Glacier County, Montana, in Book 1 of Orders and Decrees, at page 85.

12.

That thereafter, and while she was still the owner of said quarter section of land, the said Clissie A. Hawkins made, executed and delivered to Louis B. O'Neill an Oil & Gas Lease covering the whole of said quarter section, and which, by mesne assign-

ments, has been transferred and is now owned and held by Glacier Production Company, a corporation. That said Oil & Gas Lease is dated October 15, 1931, and was recorded in the Office of the County Clerk and Recorder of Glacier County, Montana, on June 9th, 1932, in Book 3 of Oil & Gas Leases, at Page 559.

13.

That under and by virtue of the terms of said Oil & Gas Lease, the said land was leased for oil and gas mining purposes for a period of ten (10) years from its date and so long thereafter as oil or gas is produced from the land by the Lessee or his assigns, and the Lessor reserved a royalty of one-eighth of the oil produced and saved from said land, and [41] a royalty of the market price at the well of one-eighth of the gas produced and sold or used off said land or in the manufacture of gasoline.

14.

That the said Oil & Gas Lease is still in force and effect.

15.

That thereafter, by a Deed dated May 31st, 1934, and recorded June 4th, 1934, in Book 10 of Deeds, at page 267, in the Office of the County Clerk & Recorder of Glacier County, Montana, the said Clissie A. Hawkins, who was still then and there the owner of said quarter section of land, subject to said oil and gas lease, conveyed the same and the whole thereof, to Raymond J. MacDonald, Trustee,

and intervener herein, subject to said Oil & Gas Lease, but excepting and reserving 6¼% royalty of the oil, gas and other minerals beneath the surface of said described premises.

16.

That the said intervener now, and at all times since the said conveyance to him, owns the said land, as Trustee under the Declaration of Trust aforesaid, and all the oil, gas, and other minerals therein, except 6¼% royalty, as reserved in said Deed by the Grantor therein.

17.

That neither the above named Plaintiff nor the above named Defendant has any right, title, or interest to or in the oil, gas and other minerals in, under, or beneath the surface of the part of the said NE¼SW¼ of said Section 17, Township 33 North, Range 5 West, M. M., Glacier County, Montana, that is within the said right of way limits.

18.

That the oil and gas, and other minerals, or either [42] of them, beneath the surface of the land within said right of way limits are not a part of Defendant's said right of way, and that the same can be withdrawn or extracted therefrom by wells drilled on Intervener's said quarter section, but off of said right of way, without injury to said right of way, and without interfering with the use thereof by the Defendant for a railroad right of way.

Wherefore, having fully answered the Plaintiff's Complaint, the Intervener prays that the Plaintiff take nothing by his said action insofar as the claim to relief is based upon Plaintiff's claim of ownership of the oil, gas and other minerals beneath the surface of the right of way.

W. H. HOOVER
L. V. KETTER
J. E. CORETTE, JR.
Attorneys for Intervener

[Endorsed]: Filed June 22, 1939. [43]

Thereafter, on July 24, 1939, Objection to Motion for leave to intervene was filed herein by the plaintiff, and is in the words and figures following, towit: [44]

[Title of District Court and Cause.]

OBJECTION TO MOTION FOR LEAVE TO INTERVENE

Comes Now the plaintiff, the United States of America, and objects to the motion and petition for leave to intervene of Raymond J. MacDonald, as Trustee of an express trust for others, and objects to the jurisdiction of the court to hear and determine the same, or to grant said motion upon the following grounds and for the following reasons:

I.

That the intervenor is not a party permitted under Rule 24 of the Rules of Civil Procedure to

intervene, either as a matter of right or by permission of court.

II.

That the petition and complaint in intervention does not state a cause of action.

III.

That the intervenor seeks to enlarge the issues of the action and seeks to have tried issues not made by the pleadings between the United States of America, plaintiff, against the [45] Great Northern Railway Company, a Corporation, defendant.

IV.

That the intervenor has no interest in the subject matter of this action.

V.

That the intervenor seeks to secure a declaratory judgment against the United States and that the court has no jurisdiction to grant such declaratory judgment.

VI.

That if the complaint or petition in intervention is allowed, it will constitute a suit brought against the United States without its consent.

VII.

That the intervenor by his petition seeks to try and determine title to lands claimed by the United States and that the intervenor seeks by the said petition in intervention to secure a judgment quieting

title to lands claimed by him as against the United States and its claim of ownership.

VIII.

That a judgment in the action will not bind the Intervenor and will not prejudice his interests or rights.

IX.

That the court is without jurisdiction to make the United States a party defendant to a cross bill of the character sought by the intervenor through his petition in intervention.

Dated this 22nd day of June, 1939.

JOHN B. TANSIL,
United States Attorney
ROY F. ALLAN
Assistant United States Attorney
AUBREY LAWRENCE
Special Assistant to the Attorney General.

[Endorsed]: Filed July 24, 1939. Considered as filed on June 22, 1939, for purposes of argument on that date. [46]

Thereafter, on July 24, 1939, Answer to Complaint of Intervenor was filed by the Plaintiff herein, which is in the words and figures following, towit: [47]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT OF INTERVENOR.

Comes Now the United States of America and for answer to the complaint in intervention of Raymond J. MacDonald, as Trustee of an express trust for others, alleges:

I.

That the intervenor is not a party permitted under Rule 24 of the Rules of Civil Procedure to intervene, either as a matter of right or by permission of court.

II.

That the petition and complaint in intervention does not state a cause of action.

III.

That the intervenor seeks to enlarge the issues of the action and seeks to have tried issues not made by the pleadings between the United States of America, plaintiff, against the Great Northern Railway Company, a Corporation, defendant.

IV.

That the intervenor has no interest in the subject matter of this action. [48]

V.

That the intervenor seeks to secure a declaratory judgment against the United States and that the court has no jurisdiction to grant such declaratory judgment.

VI.

That if the complaint or petition in intervention is allowed, it will constitute a suit brought against the United States without its consent.

VII.

That the intervenor by his petition seeks to try and determine title to lands claimed by the United States and that the intervenor seeks by the said petition in intervention to secure a judgment quieting title to lands claimed by him as against the United States and its claim of ownership.

VIII.

That a judgment in the action will not bind the intervenor and will not prejudice his interests or rights.

IX.

That the court is without jurisdiction to make the United States a party defendant to a cross bill of the character sought by the intervenor through his petition in intervention.

The United States for further answer to the complaint in intervention of Raymond J. MacDonald, as Trustee of an express trust for others, denies generally each and every allegation of said complaint except so much thereof as is hereinafter admitted or explained.

I.

Plaintiff admits paragraph I of the said complaint of intervention insofar as it alleges the court has jurisdiction of the action as between the

United States and the Great Northern Railway Company, a Corporation, and admits the matter [49] in controversy exceeds, exclusive of interest and costs, the sum in value of Three Thousand Dollars ($3,000.00) and that the action arises under the laws of the United States.

II.

Plaintiff admits the allegations contained in paragraph II of the complaint in intervention.

III.

Plaintiff admits the allegations contained in paragraph III of the complaint in intervention.

IV.

Plaintiff admits the allegations contained in paragraph IV of the complaint in intervention.

V.

Plaintiff admits the allegations contained in paragraph V of the complaint in intervention.

VI.

Plaintiff admits the allegations contained in paragraph VI of the complaint in intervention.

VII.

Plaintiff admits the allegations contained in paragraph VII of the complaint in intervention.

VIII.

Plaintiff admits the allegations contained in paragraph VIII of the complaint in intervention.

IX.

Plaintiff admits the allegations contained in paragraph IX of the complaint in intervention.

X.

Plaintiff admits the allegations contained in paragraph X of the complaint in intervention insofar as a homestead entry was made by the said Lemuel J. Hawkins as to the SW¼ of Section 17, Township 33 North, Range 5 West, M. M., now [50] in Glacier County, Montana, but alleges that said entry does not include the lands contained within the right of way of the Great Northern Railway Company and such portion of the SW¼ of Section 17, Township 33 North, Range 5 West, M. M., Glacier County, which was within the right of way of the Great Northern Railway Company, had been withdrawn from public entry under the public land laws of the United States prior to said homestead entry of the said Lemuel J. Hawkins.

XI.

Plaintiff admits the allegations contained in paragraph XI of the complaint in intervention.

XII.

Plaintiff specifically denies the allegations contained in paragraph XII of the complaint in intervention.

XIII.

Plaintiff specifically denies each and every allegation contained in paragraph XIII of the complaint in intervention.

XIV.

Plaintiff specifically admits the allegations contained in paragraph XIV of the complaint in intervention, except as to the ownership of the intervenor to the aforesaid lands and the oil, gas and other minerals therein contained.

XV.

Plaintiff admits the allegations of paragraph XV of the complaint in intervention.

XVI.

Plaintiff admits the allegations of paragraph XVI of the complaint in intervention.

XVII.

Plaintiff admits the allegations of paragraph XVII of the complaint in intervention. [51]

XVIII.

Plaintiff admits the allegation of paragraph XVIII of the complaint in intervention, except insofar as the same may be construed to allege the ownership in any person other than the United States of the oil, gas and minerals underlying the right of way of the Great Northern Railway Company across said lands.

XIX.

Plaintiff admits the allegations of paragraph XIX of the complaint in intervention.

XX.

Plaintiff in answer to paragraph XX of the

complaint in intervention alleges that it is the owner of all oil, gas and minerals under or beneath the surface of that part of the lands described therein, that is, within the right of way of the Great Northern Railway Company.

XXI.

Plaintiff admits the allegations of paragraph XXI of the complaint in intervention.

XXII.

Plaintiff in answer to allegations contained in paragraph XXII of the complaint in intervention, alleges that the oil, gas and other minerals beneath the surface of the right of way of the Great Northern Railway Company across the lands involved in this action are the property of the United States, but alleges that it has no information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph XXII of the complaint in intervention and, therefore, denies the same.

XXIII.

Plaintiff denies the allegations contained in paragraph XXIII of the complaint in intervention, except that the Great [52] Northern Railway Company claims to be the owner of the oil, gas and other minerals beneath the surface of its right of way across the lands described, and threatens and will, unless restrained by the court, to drill wells thereon, extract and remove the same from its own use.

XXIV.

Plaintiff specifically denies the allegations contained in paragraph XXIV of the complaint in intervention.

Wherefore, the plaintiff prays judgment that the court decree that it has no jurisdiction to try and determine the claims of the intervenor in this action, but that if the court assumes jurisdiction that the intervenor take nothing by his complaint in intervention and that the plaintiff have judgment for its costs and disbursements.

Dated this 22nd day of June, 1939.

JOHN B. TANSIL,
United States Attorney.
ROY F. ALLAN,
Assistant United States Attorney.
AUBREY LAWRENCE,
Special Assistant to the
Attorney General.

[Endorsed]: Filed July 24, 1939. Considered as filed on June 22, 1939, for purposes of argument on that date. [53]

Thereafter, on July 24, 1939, Reply to Answer and Affirmative Defense of Raymond J. MacDonald, Intervenor, was filed by the plaintiff herein, which is in the words and figures following, towit: [54]

[Title of District Court and Cause.]

REPLY TO ANSWER AND AFFIRMATIVE DEFENSE OF RAYMOND J. MacDONALD, as Trustee of an express trust for others, Intervenor.

Comes Now the plaintiff above named and for reply to the answer and affirmative defense of Raymond J. MacDonald, as Trustee of an express trust for others, alleges:

I.

That the intervenor is not a party permitted under Rule 24 of the Rules of Civil Procedure to intervene, either as a matter of right or by permission of court.

II.

That the affirmative answer of the intervenor constitutes a statement of a cause of action against the United States which has not consented to be sued.

III.

That the affirmative answer of the intervenor is a cross complaint and seeks to determine the title to lands claimed by the United States and intervenor, therefore, seeks to secure a judgment quieting title to lands claimed by him [55] as against the United States and its claim of ownership and, therefore, constitutes a suit against the United States brought without its consent.

The plaintiff for further reply to said answer and defense specifically denies each and every alle-

gation of said affirmative answer, except so much thereof as hereinafter specifically admitted.

I.

Plaintiff admits the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, XI, XII, XIII, XIV and XV of the affirmative answer.

II.

Plaintiff for further reply to said answer and affirmative defense denies the allegations of said paragraph IX insofar as the same alleges that the right of way of the Great Northern Railway Company was included within said patent.

III.

Plaintiff denies the allegations of paragraph X of the answer and affirmative defense of said intervenor.

IV.

Plaintiff admits the allegations contained in paragraph XI of the affirmative answer, except insofar as the answer alleges that the intervenor is the owner of the oil, gas and other minerals beneath the surface of the right of way of the Great Northern Railway Company across said lands.

V.

Plaintiff denies the allegations of paragraph XVI of the answer and affirmative defense of said intervenor.

VI.

Defendant for reply to the allegations contained in paragraph XVII of the said affirmative answer alleges that plaintiff is the owner of the oil, gas and other minerals in or under the right of way of the Great Northern Railway [56] Company.

VII.

Plaintiff for further reply to the allegations contained in paragraph XVIII of the said answer and affirmative defense, alleges that the oil, gas and other minerals beneath the surface of the land within the right of way of the Great Northern Railway Company are the property of the United States, and further alleges that the plaintiff has no information or knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph XVIII, and therefore denies the same.

Wherefore, the plaintiff prays judgment that the court decree that it has no jurisdiction to try and determine the claims of the intervenor in this action, but that if the court assumes jurisdiction that the intervenor take nothing by his complaint in intervention and that the plaintiff have judgment for its costs and disbursements.

Dated this 22nd day of June, 1939.

JOHN B. TANSIL,
United States Attorney
ROY F. ALLAN,
Assistant United States Attorney
AUBREY LAWRENCE,
Special Assistant to the Attorney General

[Endorsed]: Filed July 24, 1939.

Considered as filed on June 22, 1939, for purposes of argument on that date. [57]

Thereafter, on June 26, 1939 (as of June 22, 1939), defendant's Answer to Intervener's Complaint in Intervention was duly filed herein, which is in the words and figures following, towit: [58]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, GREAT NORTHERN RAILWAY COMPANY, TO INTERVENER'S (RAYMOND J. MacDONALD, TRUSTEE) COMPLAINT IN INTERVENTION

Comes now the defendant, Great Northern Railway Company, and for its answer to intervener's (Raymond J. MacDonald, Trustee) complaint in intervention, filed in the above entitled action, admits, denies and alleges as follows:

I.

Defendant admits each and all of the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XII, XV, XVI, XVII, XVIII, XXI, and XXIV of said intervener's complaint in intervention, except that it alleges that the "Right of Way" referred to in said paragraphs was not a mere easement or interest in the surface of the land but that it was a strip of land, the entire in-

terest in which, including underlying oil and minerals, was conveyed to defendant's predecessor in fee, subject only to an implied condition that the entire area be used or kept fully available for railway purposes; and defendant denies that the patent to intervener's predecessor or any of the conveyances in intervener's chain of title were effective to [59] convey any interest in the defendant's said right of way strip or in the oil underlying the same.

II.

Answering paragraph XI of said intervener's complaint in intervention, this defendant admits that the patent mentioned in said paragraph described the whole of the quarter section therein mentioned, but denies that it conveyed any right, title, or interest in and to that part of said quarter section lying within the 200 foot limits of the right of way granted to this defendant by the Act of March 3, 1875, and passing over the NE¼ of said quarter section.

III.

Answering paragraph XIII of said intervener's complaint in intervention, this defendant admits each and all of the allegations contained in said paragraph except that this defendant denies that any or all of the oil, gas, or minerals located beneath this defendant's 200 foot right of way, described in said intervener's complaint in intervention, was granted to the said patentee and that the said pat-

entee became the owner of, and entitled to the possession of, all or any part of the oil, gas, and other minerals located beneath this defendant's said right of way by virtue of said patent.

IV.

Answering paragraph XIV of said intervener's complaint in intervention, the defendant admits each and all of the allegations contained therein except that defendant denies that the patentee was, at any time, the owner of the oil, gas, and other minerals beneath defendant's said right of way.

V.

Answering paragraph XIX of said intervener's complaint in intervention, defendant admits each and all of the allegations contained therein except that defendant denies that intervener [60] as trustee is, or at any time was, the owner of the oil, gas and other minerals underneath defendant's said right of way.

VI.

Answering paragraph XX of said intervener's complaint in intervention, defendant denies each and every allegation therein contained.

VII.

Answering paragraph XXII of said intervener's complaint in intervention, defendant denies that the oil, gas, and other minerals beneath the surface of the land within said right of way are not a part of defendant's said right of way. Defendant admits

that the oil underlying its right of way can be withdrawn or extracted therefrom by wells drilled on intervener's quarter section and off of said right of way, without injury to the surface of defendant's right of way strip or to the tracks or structures located thereon. Defendant denies that said oil could be withdrawn without injury to any part of defendant's right of way or without interfering with the use thereof by defendant for a railroad right of way, for the reason that said oil is itself a part of the said right of way, susceptible to use for railway fuel, and that the withdrawal thereof would, therefore, ipso facto injure the right of way and prevent the withdrawal of said oil by defendant and to the use thereof by defendant in the operation of its locomotives.

VIII.

Answering paragraph XXIII of said intervener's complaint in intervention, defendant admits each and all of the allegations of said paragraph except that defendant denies that it will deprive the intervener of any of his alleged property mentioned in said paragraph or that it will cause intervener irreparable damage and injury. [61]

IX.

Further answering said complaint, and as an affirmative defense thereto, defendant alleges that there is oil underlying said right of way of a character and quantity suitable for use as fuel upon de-

fendant's locomotives operated upon its interstate railroad which passes over said right of way, and not in excess of its requirements for that purpose, and that it is economically practicable and desirable for defendant to remove said oil and use the same upon its said locomotives, and that defendant will suffer severe loss if restrained or enjoined from so doing.

X.

Defendant further alleges that said oil has a commercial value substantially in excess of the cost of producing the same, and that if defendant is permitted to remove said oil, it can sell the same commercially for large amounts of money which would be of great value and assistance to defendant in the operation of its railroad.

XI.

Defendant further alleges that the said oil contains volatile portions which can be removed by refinement and sold as a by-product and used for gasoline and other similar products, leaving a residue which is suitable for locomotive fuel, and that the greatest net proceeds and best economic results can be obtained from said oil by refining the same and by disposing of the more volatile portions commercially as a by-product and using the residue as fuel oil.

Unless restrained by this Court, defendant intends to and will drill three separate wells upon said right of way. The oil produced from well num-

ber one will be sold commercially and the proceeds used in the operation of defendant's railroad. The oil produced from well number two will be refined, the more [62] volatile portions being sold commercially and the residue being used as fuel oil upon defendant's locomotives. The oil produced from well number three will be used in its entirety as fuel oil upon defendant's locomotives.

Wherefore, defendant prays that the prayer contained in said intervener's complaint in intervention be denied and that said defendant have and recover of the said intervener its costs and disbursements herein incurred.

T. B. WEIR
F. G. DORETY

June 22, 1939.

[Endorsed]: Filed June 26, 1939 as of June 22, 1939. [63]

Thereafter, on June 22, 1939, Intervener's Motion for Judgment on the Pleadings was duly filed herein, in the words and figures following, towit: [64]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now the above named intervener, Raymond J. Macdonald, as Trustee, and moves the court for a judgment on the pleadings as prayed for in

his complaint in intervention, in favor of the intervener and against the defendant, Great Northern Railway Company, upon the ground and for the reason that the pleadings in the case raise no material issue of fact, but only questions of law, and under said pleadings the plaintiff is entitled to the judgment prayed for against said defendant as a matter of law.

And, further, said intervener moves the above entitled court for a judgment on the pleadings as prayed for in his answer to plaintiff's complaint upon the ground and for the reason that the pleadings in the case raise no material issue of fact, but only questions of law, and under said pleadings, the intervener is entitled to the judgment prayed for in its said answer.

Dated this 22nd day of June, 1939.

W. H. HOOVER
L. V. KETTER
J. E. CORETTE, JR.
Attorneys for Raymond J. MacDonald, Trustee.

[Endorsed]: Filed June 22, 1939. [65]

Thereafter, on April 25, 1940, Decision of the Court was duly filed herein, in the words and figures following, towit: [66]

[Title of District Court and Cause.]

A motion for judgment on the pleadings came on regularly for hearing in the above entitled cause

and by agreement of counsel the issues are to be determined upon that motion, supported and opposed by briefs of counsel for the respective parties, including one filed under the application to intervene by Raymond J. MacDonald, as trustee.

This suit was begun pursuant to advices from the defendant, Great Northern Railway Company, that it proposed to drill oil wells on its right of way in Glacier County, Montana, through which the company maintained and operated an interstate line of railroad. The complaint filed herein seeks a permanent injunction restraining and enjoining the defendant company "from in any manner using the right of way granted as hereinbefore described, for the purpose of drilling for and removing oil, gas and minerals underlying its right of way except under a lease issued pursuant to the provisions of the said Act of May 21, 1930, and that a permanent injunction issue, restraining the defendant, the Great Northern Railway Company, from drilling for or removing any oil, gas or minerals beneath the surface of its right of way, crossing the lands hereinbefore described, or any other lands granted under the Act of March 3, 1875, and now owned or used by the said defendant [67] except under a lease issued pursuant to the provisions of the said Act of May 21, 1930". (46 Stat. 373).

In its answer the defendant company admits that it intends to drill for and remove the oil underlying the surface of its right of way, and denies that such oil or any part thereof is the property of the plain-

tiff, and denies that "the United States will be deprived of any property or that it will suffer any irreparable or other injury as a result of the defendant's intended action."

The principal issue arises over the interpretation to be given the Act of Congress of March 3, 1875 (18 Stat. 482), which so far as it is of material interest here, is as follows: "The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

The defendant company acquired its right of way by deed from its predecessor in interest, the St. Paul, Minneapolis and Manitoba Railway Company, to which latter company the original right of way was granted, and no question is raised as to the sufficiency of such conveyance or the rights of [68]

property, including the right of way, thereby acquired.

The defendant company contends that under the act aforesaid it was granted more than an easement—that its grant amounted to a limited fee, and that it thereby acquired an ownership of the oils and minerals underlying its right of way.

The plaintiff contends that the defendant was granted only an easement, or right to cross public lands of the United States, with no right whatever to the oils and minerals underlying the surface, and no question raised that at the time of the grant the company's right of way extended across public lands of the United States, and that the only statutes pertinent to the issue here involved are those of March 3, 1875 and May 21, 1930; the latter providing for the leasing of oil and gas deposits in or under lands embraced in railroad or other rights of way, and the Secretary of the Interior whenever he deems it consistent with the public interest is authorized to lease such deposits "whether the same be a base fee or mere easement." Plaintiff contends that the result here depends upon the interpretation given the Act of March 3, 1875, therefore the most important step in the first instance will be to determine, if possible, the legislative intent as disclosed by the debates and reports during the consideration and passage of the bill which later became the Act in question.

It appears that in 1874 the questions before Congress relating to this subject and which resulted in

the passage of the Act of March 3, 1875, had no relation to any bonus or grant of benefits, although at a former period Congress had granted lands or bonuses to aid in railroad development. Lengthy debates took place over the bill in question which granted an easement over both public and Indian lands, but [69] that throughout these debates nothing was said to indicate that bonuses or benefits in the minerals or oils underlying the surface of the right of way was intended to be transferred, but only the right to cross public lands and Indian lands.

From the excerpts supplied by counsel for the government (Vol. 3, Pt. 1, 43rd Cong., 2nd Sess., Vol. 118, Cong. Rec. 404, 405, 406, 407) relating to debates on the bill the intent of Congress seems to be clear and unmistakable and may be summed up in the statement of Mr. Hawley of Illinois who said during the debate: "It simply and only gives the right of way. It merely grants to such railroad companies as may be chartered the right to lay their tracks and run their trains over the public lands; it does nothing more," and also the following colloquy which took place during debate on the later measure: "Mr. Stafford: Do I understand that all of the land on these rights of way is owned by the government? Mr. Colton: The minerals under the land are owned by the government, but the owner of the right of way has a limited fee in the lands, an easement." (Cong. Record, 71st Cong., 2nd Sess. Vol. 2, Part 4, Pages

3788 and 3789.) These and other similar expressions disclosed during the debates would seem to preclude the idea that Congress intended to return to the abandoned policy of granting bonuses to railroads which seems to have come to an end with the grant to the Texas & Pacific in 1871, or that the act in question should be construed to mean anything more than a grant of right of way over the public lands.

In 1929 Secretary of the Interior Wilbur wrote the Senate Chairman of the Public Lands Committee favoring legislation to safeguard the rights of the government in deposits of oil and gas underlying easements and rights of way acquired under the public land laws, and enclosed a [70] proposed bill for that purpose, adding that the owner of the easement or right of way had no claim to the oil or gas underneath. The House Committee report on the bill discloses the intent of the members thereof, authorizing a favorable report on the bill, wherein the following appeared: "The owner of the easement of right of way has no claim to the oil or gas and by reason of the narrowness of the easement and right of way the underlying oil and gas cannot be disposed of or operated in terms of normal subdivision or units as is done with other lands * * *.

This bill would give the Secretary of the Interior authority to lease deposits of oil and gas in lands embraced in railroad and other rights of way to the owner of the right of way at a royalty to be

fixed by the Secretary of not less than 12½ per cent * * *," (House Report No. 263, 71st Congress, 2nd Sess. Doc. No. 9190). Thus it appears that Congress again, fifty five years later, reaffirmed its interpretation of the Act of March 3rd, 1875, in the Act of May 21st, 1930, providing for the leasing of oil and gas deposits in or under railroad and other rights of way. Excerpts from the debate on the bill taken from the Congressional Record show confirmation of the original intent and purpose of the Act of 1875; among the participants in that debate was Senator T. J. Walsh of Montana, an eminent lawyer, who said: "The Government still owns the minerals under the right of way; it does not belong to the railroad company; but the wells in the adjacent lands are draining that oil without any return to the government of the United States."

The case of Tiger v. Western Investment Co., 221 U. S. 286, 306, 309, is an authority for consideration of subsequent legislation on the same subject matter to aid in the interpretation of the prior act; also Cope v. Cope, 137 U. S. 682; [71]U. S. v. Freeman, 3 How. 556. The language of the Act is clear and explicit, and that, coupled with the intent of Congress so emphatically expressed, should leave no doubt as to the extent of the easement or right of way granted under the act, and half a century later Congress again considers the same subject and re-affirms the intent disclosed in the passage of the original act. Many authorities have

been cited to confirm the doctrine that grants of this nature are to be strictly construed against the grantees; that nothing passes except what is conveyed in clear and explicit terms; that it is to be regarded as a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not plainly expressed, they can not be implied; nothing can be taken against the state by presumption or inference; all rights, privileges and immunities not expressly granted are reserved; in all doubtful cases the grant must be interpreted in favor of the sovereign. (Charles River Bridge v. Warren Bridge, 11 Peters 420; Dubuque and Pacific Railroad Company v. Litchfield, 23 How. 66, 88; The Delaware Railroad Tax, 18 Wall. 206, 225; Coosaw Mining Co. v. South Carolina, 144 U. S. 551; Hannibal, etc. Railroad v. Missouri River Packet Co., 125 U. S. 260, 271; Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 49; Stein v. Bienville Water Supply Co., 141 U. S. 67, 80; Slidell v. Grandjean, 111 U. S. 412, 437; Northern Pacific Railroad v. Soderberg, 188 U. S. 534; Hamilton v. Rathbone, 175 U. S. 414, 419; Lake County v. Rollins, 130 U. S. 662, 670, 671;)

Many definitions have been given by counsel for the respective parties of the term "right of way" but the consensus of opinion seems to be that it means exactly what the words imply, that is to say, the right to use the grant of right of way for the purpose of constructing, maintaining, and [72]

operating a railroad thereon. For a comprehensive definition counsel have cited Kansas C. R. Co. v. Allen, 22 Kan. 285, 31 Am. Rep. 190, and adopted in East Tennessee, V. & G. R. Co. v. Telford, 89 Tenn. 293, 10 L. R. A. 855, 14 S. W. 776, also McLemore v. Memphis & C. R. Co., 69 S. W. 338. The following definition is taken from 51 C. J. Sec. 193, P. 530: "The property rights of a railroad company under an easement in its right of way extend upward for a space necessary for the use of its franchise and downward to a line of support for its tracks and superstructure." See also Lockwood v. Ohio River R. Co., et al., 103 Fed. 243, 246, 247; Midland Valley R. Co. v. Corn, et al., 21 Fed. (2) 96, 97, 98, 99; U. S. v. Sweet, 245 U. S. 563. In the latter case the court held as an indication of established policy on pages 569, 572: "* * * noticeable among those acts is one which, in dealing with grants to Nevada and surveys in that state, declared, "in all cases land valuable for mines of gold, silver, quicksilver, or copper shall be reserved from sale," c. 166, 14 Stat. 85, and another declaring, "no act passed at the first session of the thirty-eighth Congress, granting lands to states or corporations, to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant," (13 Stat.

567.) Although applied in one instance to lands in Nevada and in the other to grants made at a particular session of Congress, these declarations were but expressive of the will of Congress that every grant of public lands, whether to a state or otherwise, should be taken as reserving and excluding mineral lands in the absence of an express purpose to include them; * * *." [73] Other cases therein cited support that rule: Mining Co. v. Consolidated Mining Co., 102 U. S. 167, 174; Deffeback v. Hawke, 115 U. S. 392, 402; Davis v. Weibbold, 139 U. S. 507, 516; Dunbar Lime Co. v. Utah-Idaho Sugar Co., 17 Fed. (2) 351. In Northern Pacific Ry. v. Townsend, 190 U. S. 267, 271, the court construed an act similar to that of March 3rd, 1875, where a homesteader attempted to acquire a portion of a railroad right of way by adverse possession, and wherein the court held: "The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes." This ruling would seem to prohibit the use of the right of way for any other purpose than that for which it was granted. And again the court held in the same case: "The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In ef-

fect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

In some instances the same cases have been cited and relied upon by both sides, such as Great Northern Railway Co. v. Steinke, and Northern Pacific Railway Co. v. Townsend. Voluminous briefs have been submitted by counsel for the defendant railway company, touching every possible phase of the case, both near and remote, but there is one prominent feature upon which they seem to have placed too little importance, and that is the intent of Congress disclosed by the reports and debates during the consideration and passage of the act. The court has referred to the Steinke case [74] and commented on the Townsend case; in the former it was held: "Nothing was granted for private use or disposal, nor beyond what Congress deemed reasonably essential, presently or prospectively, for the quasi public uses indicated."

The defendant takes the position that Congress studiously refrained from excepting minerals from the act in question and that failure to do so indicated a deliberate purpose. Defendant refers to it as land granted or as a land grant, while the court has considered it an easement for right of way which was granted the company in accordance with a settled policy, which did not extend to drilling for oil underneath the right of way, but did permit

the taking of material, earth, stone and timber from public lands adjacent to the line of road "necessary for the construction of said railroad." But such taking would not be allowed "for the purpose of constructing rolling stock or equipment employed in its transportation business." U. S. v. Denver and Rio Grande Railway Co., 150 U. S. 1, 13, 14, 15. Reference is made to the interpretation given similar statutes by the Interior Department which seem worthy of consideration; these cases relate to grants of right of way to the Missouri, Kansas and Texas Ry. Co., 33 L. D. 470 and 34 L. D. 505, wherein it was held that mineral oils underneath the right of way were part of the realty (Act of February 28, 1902, Sec. 13), and in a grant of right of way under the act of July 26th, 1866 it was decided that the grantee had no authority under its grant of right of way to lease any portion thereof to sink oil wells.

The application to intervene was considered at the hearing on the motion for judgment on the pleadings, and was allowed subject to further consideration of the objections interposed by plaintiff. As it then appeared to the court there was a claim of interest by all parties in the oil sup- [75] posed to be underlying the right of way. However, the plaintiff has seriously challenged the right of R. J. MacDonald, trustee, to intervene. From the argument of counsel for intervener it does not matter whether the right of way is an easement with attributes of a fee or is a limited fee, that these are

but terms of tenure and do not define the quantity of the estate granted; that where a grant is limited in its use for railroad right of way it is a limited fee, and "under the Act of 1875 if it is an easement it is the right to use so much of the surface and sub-surface as is necessary for a railroad right of way. If it is a limited fee it is a grant of so much of the land as is necessary to be used for a railroad right of way, the grant to terminate when the user ceases. This use only requires the surface and so much of the sub-surface as might be necessary to be used for the right of way. Whatever the tenure, the underlying minerals did not pass by the grant to the railroad company", and in the opinion of the court counsel for the intervening trustee have presented a convincing argument to sustain their contention in that respect. Some of the cases relied upon by counsel for the plaintiff have been cited in support of the same argument by counsel for the trustee against the right claimed by the defendant railway company to use of the minerals underneath the right of way. After demonstrating that the railway company has no right to remove the minerals so situated, the trustee then contends that such minerals within the 200 foot strip passed from the plaintiff to the patentee by virtue of the patent upon which the trustee bases his claim, coupled with certain language of the act of March 3rd, 1875, which reads as follows: "thereafter all such lands over which such right of way shall pass, shall be disposed of subject to such right of way * * *." Before passing to a con-

sideration of the merits of intervener's [76] cause, the arguments in briefs of counsel for both sides in respect to the right of the trustee to intervene must be given further attention. The first and perhaps the principal objection to intervention is the claim made by the trustee to ownership of the minerals in question, at the same time seeking a judgment or decree against the United States in recognition of such claim. Here the objection becomes two-fold, as it appears to be not only a substitution of the intervener for the defendant but likewise a suit against the United States without its consent, accomplished by indirection by alleging a claim of ownership against the United States in a cross bill. Although the intervener's complaint presents the appearance of being a suit against the defendant railway company, it never-the-less asks for a decree which if rendered would result in quieting title to the property in the trustee and in making an adverse ruling against the government. There could be no distinction between suits against the United States directly and suits against its property. Whoever sues the United States must bring his case within the authority of some act of Congress. (Belknap v. Schild, 161 U. S. 10, 16, 17; Stanley v. Schwalby, 147 U. S. 508, 512.)

Again, the Supreme Court has held that the question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.

(Minnesota v. Hitchcock, 185 U. S. 373, 387.) On this subject the court again held in Lynch v. United States, 292 U. S. 571, 582, that: "The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress." Mr. Chief Justice Taft held in Nassau Smelting & Refining Works, [77] Ltd., v. U. S., 266 U. S. 101, 106, in respect to suing the United States: "The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it."

If a judgment were allowed under a plea of set-off, that would be in effect permitting the United States to be sued. (Reeside v. Walker, 52 U. S. 271, 289, 290.) Many other decisions and rules on the subject of intervention are to be found, but the foregoing appears to be sufficient for a determination of the issues here.

Counsel for the intervener have presented an able discussion of the right to intervene as well as of the merits of the case. However, while rule 24 of the Rules of Civil Procedure may disclose some improvement in the liberalization of practice in intervention, the argument presented by plaintiff in opposition to intervention, in view of the facts not in dispute, appear to be reasonable, supported by

ample authority and not in conflict with the new rule.

If in some other suit the trustee should be able to establish his right to take oil and minerals from underneath the railroad right of way based upon a patent from the government, that possibility does not seem to present any sound reason why the plaintiff should not proceed to restrain the defendant railway company from taking property not included in the grant of right of way, based upon a federal statute. The court would prefer to dispose of the questions raised by the intervener now and in this suit, to avoid delay, but the law does not appear to favor such course of procedure.

After considering the arguments of counsel, and the statutes and authorities submitted, there seems to be no [78] doubt as to the proper interpretation to be given the act of March 3rd, 1875, aided by the subsequent act of May 21st, 1930, relating to the same subject-matter, drawn as they were in plain and unequivocal terms, supported by evidence of Congressional intent in the consideration and passage of both measures, with the background of a settled policy of Congress to reserve mineral lands unless expressly included. The court is therefore unable to find the grant of any bonus or limited fee or any statute or authority which would justify a decision holding that the defendant railway company, under this statute, is entitled to remove oil or minerals lying underneath the railroad right of way.

Wherefore, being duly advised, the court is of the opinion that the application for intervention should be denied, the motion of plaintiff for judgment on the pleadings should be granted, and that injunctive relief should be given according to prayer of complaint, and it is so ordered.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed April 25, 1940. [79]

Thereafter, on June 22, 1939, the cause was heard on Plaintiff's Motion for Judgment, and on Motion for Leave to Intervene by R. J. MacDonald, as Trustee, and Motion of R. J. MacDonald, as Trustee, for Judgment on the Pleadings, the record thereof being in the words and figures following, towit: [80]

In the District Court of the United States in and for the District of Montana

MINUTES OF THE COURT

At a stated term, to-wit, the June Term, 1939, of the District Court of the United States in and for the District of Montana, begun and held at the court room of said court in the Federal Building at the City of Billings, in the State and District of Montana, on Thursday, June 22, 1939, at 10:00 A.M., pursuant to statute and the rule of said court.

Present: Honorable Charles N. Pray,
United States District Judge
for the District of Montana.

Thereupon the following proceedings were had and done:

No. 32, United States vs. Great Northern Railway Company.

This cause was duly called for hearing this day on the plaintiff's Motion for Judgment, and on the Motion of the Star Pointer Exploration Company for leave to intervene herein, Mr. John B. Tansil the District Attorney, and Mr. Aubrey Lawrence, Special Assistant to the Attorney-General, of Washington, D.C., appearing for the United States, Mr. S. P. Wilson of Deer Lodge, Montana, and Mr. Edward J. Bloom of Wallace, Idaho, appearing for said Star Pointer Exploration Company, Mr. F. G. Dorety of St. Paul, Minn., appearing for the defendant.

Thereupon on motion of the District Attorney, court ordered that Mr. Aubrey Lawrence, Special Assistant to the Attorney General, of Washington, D. C. be admitted to practice for the purpose of this case, and that his name be entered as associate counsel for the United States.

Thereupon Mr. J. E. Corette, Jr. and Mr. L. V. Ketter, as counsel, filed and presented a notice of motion and a motion of R. J. MacDonald, as trustee, for leave to intervene herein, with a complaint in intervention and an answer to plaintiff's com-

plaint, annexed to said notice and motion, to which counsel for the United States then and there objected.

Thereupon counsel for the United States filed a written Answer and objection to the petition of the Star Pointer Exploration Company for leave to intervene herein.

Thereupon, on motion of Mr. Corette, court ordered that the record show that the notice of motion for leave to intervene and the motion and petition of R. J. MacDonald, as Trustee, for leave to intervene, with complaint in intervention and answer attached thereto, were served on the attorneys for the United States and on the attorneys for the defendant Great Northern Railway Company before court opened this day and that plaintiff and the defendant herein waive any further notice.

Thereupon the motion of the Star Pointer Exploration Company to intervene, and the motion of R. J. MacDonald, as Trustee, for leave to intervene, were duly heard, argued and [81] submitted, and by the court taken under advisement until 2:00 P. M. this day.

Thereafter at 2:00 P. M., and after due consideration, the court ordered that the said petition of the Star Pointer Exploration Company for leave to intervene herein be and is denied, to which ruling of the court counsel for the said Star Pointer Exploration Company then and there excepted and exception was duly noted. Thereupon on motion of counsel for said Star Pointer Exploration Com-

pany, said company was granted thirty days within which to file notice of appeal herein.

Thereupon, after due consideration, court ordered that the motion of R. J. MacDonald, as Trustee, for leave to intervene herein, be allowed tentatively and counsel were directed to file briefs thereon.

Thereupon Mr. Lawrence stated that as counsel for the United States he desired to appear specially at this time and object to the jurisdiction of the court to hear and determine the issues presented by the intervenor R. J. MacDonald, as Trustee, upon the ground that they constitute a cross bill or cause of action against the United States, to which the United States has not consented, which objection was by the court tentatively overruled. Thereupon Mr. Lawrence stated that the United States will desire to file an answer to the complaint in intervention of said R. J. MacDonald, as Trustee, and a reply to the answer of said intervenor, which the court ordered be considered as filed at this time.

Thereupon Mr. Dorety stated that the defendant Great Northern Railway Company will desire to file an answer to the complaint in intervention of said R. J. MacDonald, as Trustee, and court ordered that said answer be considered as filed at this time.

Thereupon Mr. Corette, as counsel for R. J. Mac Donald, as Trustee, moved the court for judgment on the pleadings, with the understanding that a written motion therefor would later be filed herein this day.

Thereupon the motion of the United States for judgment on the Pleadings and the motion of R. J. MacDonald, as Trustee, for Judgment on the Pleadings, were duly heard, argued and submitted and by the court taken under advisement.

Thereupon briefs were filed by the plaintiff and the defendant; the intervenor, R. J. MacDonald, as Trustee, was granted twenty days from this date within which to file his brief and counsel for the plaintiff and defendant were granted thirty days thereafter in which to file their reply briefs.

C. R. GARLOW,
Clerk. [82]

Thereafter, on April 25, 1940, the court ordered that the Plaintiff's Motion for Judgment on the pleadings be granted, and that the application for intervention of R. J. MacDonald, as Trustee, be denied, the

ORDER OF THE COURT

being in the words and figures following, towit:

No. 32, United States vs. Great Northern Railway Company.

This cause having heretofore been heard and submitted on the plaintiff's Motion for Judgment on the Pleadings herein, came on regularly this day for decision; whereupon the court, after due consideration, filed its written decision and ordered said motion for judgment on the pleadings granted, Court further ordered that the application for in-

tervention should be denied, and that injunctive relief be granted as prayed for in the complaint.

Entered April 25, 1940.

C. R. GARLOW,
Clerk. [83]

Thereafter, on July 22, 1940, Notice of Appeal by Raymond J. MacDonald, as Trustee, etc., was duly filed herein, in the words and figures following, towit: [84]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Raymond J. Mac Donald, as Trustee of an Express Trust for Others, Intervener, hereby appeals to the Circuit Court of Appeals of the Ninth Circuit from each and every part of that Order entered in this action on April 25, 1940, which denies his Motion and Petition for Leave to Intervene in said action, and each and all of the grounds for said denial stated in said Order.

Dated this 20th day of July, 1940.

W. H. HOOVER
J. E. CORETTE, JR.
L. V. KETTER
Attorneys for Raymond J. MacDonald, as Trustee of an Express Trust for Others, Appellant.
Address: Butte, Montana

[Endorsed]: Filed July 22, 1940. [85]

Thereafter, on July 24, 1940, Appellant's Designation of Contents of Record on Appeal was filed by Raymond J. MacDonald, as Trustee, etc., in the words and figures following, towit: [86].

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court and to the Above Named Plaintiff and Defendant, Appellees:

The above named Intervener, Raymond J. MacDonald, as Trustee of an Express Trust for Others, having filed in the above entitled court a Notice of Appeal, he, as Appellant, hereby designates the portions of the record and proceedings to be contained in the record on his appeal, to-wit:

(1) The complaint of the United States of America, plaintiff, against the Great Northern Railway Company, a corporation, defendant.

(2) The Answer of the defendant Great Northern Railway Company to the complaint of the United States of America, plaintiff, omitting affidavit of service attached to said Answer.

(3) Notice of Motion by United States of America, plaintiff, for judgment on the pleadings, omitting affidavit of service attached to said Notice.

(4) Notice of Motion by Raymond J. MacDonald, as Trustee of an Express Trust for Others, for Leave to Intervene in said action. [87]

(5) Motion and Petition by Raymond J. MacDonald, as Trustee of an Express Trust for Others, for Leave to Intervene in said action.

(6) Complaint in Intervention by Raymond J. MacDonald, as Trustee of an Express Trust for Others, Intervener.

(7) Answer of Raymond J. MacDonald, as Trustee of an Express Trust for Others, Intervener, to the Complaint of the United States of America, Plaintiff.

(8) Objection by the United States of America, Plaintiff, to Motion and Petition of Raymond J. MacDonald, as Trustee of an Express Trust for Others.

(9) Answer of the United States of America, Plaintiff, to the Complaint in Intervention by Raymond J. MacDonald, as Trustee of an Express Trust for Others, Intervener.

(10) Reply of the United States of America, Plaintiff, to the Answer and affirmative defense of Raymond J. MacDonald, as Trustee of an Express Trust for Others, Intervener.

(11) Answer of the Defendant, Great Northern Railway Company to the Complaint in Intervention of Raymond J. MacDonald, as Trustee of an Express Trust for Others, Intervener.

(12) Motion for Judgment on the Pleadings by Raymond J. MacDonald, as Trustee of an Express Trust for Others, Intervener.

(13) The Decision and Order of the above entitled court made and entered on April 25, 1940, denying the Motion of Raymond J. MacDonald, as Trustee of An Express Trust for Others for Leave to Intervene in said action, and ordering Judgment on the pleadings for the Plaintiff, United States of America, against the Defendant, Great Northern Railway Company.

(14) The Minutes of the Court, relating to the proceedings had at the trial on June 22, 1939 in the above entitled case, and relating to the filing of the Decision and Order mentioned in (13) hereof.

(15) Notice of Appeal by Raymond J. MacDonald, as Trustee of an Express Trust for Others, Intervener, with date of filing.

(16) Statement by the Appellant, Raymond J. MacDonald, as Trustee of an Express Trust for Others, of the points on which he intends to rely on the appeal, omitting Affidavit of Service.

The said Clerk is requested to prepare, certify, and transmit to the United States Circuit Court of Appeals for the [88] Ninth Circuit Court at San Francisco, California, the record composed of a true copy of the above designated portions of the record

and proceedings in the above entitled case, as provided by the rules of Civil Procedure for the District Court of the United States.

Dated this 23rd day of July, 1940.

W. H. HOOVER
J. E. CORETTE, JR.
L. V. KETTER
Attorneys for Appellant Raymond J. MacDonald, as Trustee of an Express Trust for Others.

[Endorsed]: Filed July 24, 1940. [89]

Thereafter, on July 24, 1940, Statement of the Points on which Appellant Raymond J. MacDonald as Trustee, etc., intends to rely on his appeal, was duly filed herein, in the words and figures following, towit: [90]

[Title of District Court and Cause.]

STATEMENT OF THE POINTS ON WHICH APPELLANT, RAYMOND J. MacDONALD AS TRUSTEE OF AN EXPRESS TRUST FOR OTHERS INTENDS TO RELY ON HIS APPEAL

Comes now Raymond J. MacDonald, as Trustee of an Express Trust for Others, Intervener and Appellant in the above entitled case, and makes

this statement of the points on which he intends to rely on his appeal:

I.

That the defendant, Great Northern Railway Company, under the grant of right of way by the Act of March 3rd, 1875 of the Congress of the United States (18 Rev. Stats. 482; Title 43, Sections 934-939, both inclusive, of the U.S.C.A.) acquired only an easement or a limited fee IN THE SURFACE of the strip of land 200 feet wide crossing the NE¼SW¼ of Section 17, Township 33 North, Range 5 West, M.M., Glacier County, and SO MUCH OF THE SUBSURFACE AS IS NECESSARY to be used for RIGHT OF WAY PURPOSES, and that the oil, gas, and other minerals [91] underneath the right of way remained the property of the United States and did not pass with the grant of the right of way; that by virtue of a homestead patent covering and describing the whole of the SW¼ of said Section 17, which included the NE¼ of said quarter section over which the right of way passes, issued by the United States to Lemuel J. Hawkins, after the right of way was located and the road constructed thereon, and which did not contain any exception or reservation of them, the oil, gas and minerals underneath the right of way passed to the said patentee, and Appellant, by mesne conveyances, has succeeded to the patentee's ownership of said minerals, subject to the rights of the lessee in an oil and gas lease

covering the whole of the SW¼ of said Section 17, and to a reserved royalty of 6¼% of said minerals, and therefore:

(a) As such owner Appellant was entitled to intervene in said action as a matter of right, and the court erred in denying Appellant's Motion and Petition for Leave to Intervene therein.

(b) If Appellant was not entitled to intervene as a matter of right the court abused its discretion in denying Appellant's Motion and Petition for Leave to Intervene.

(c) The United States was not entitled to maintain the suit for an injunction restraining the defendant, Great Northern Railway Company, from taking the said oil, gas, and other minerals from underneath the right of way, in that it had no title thereto, the same belonging to the Appellant.

(d) Appellant was entitled to intervene and have a writ of injunction against the defendant Great Northern Railway Company, enjoining it from taking the said minerals, as prayed for in his complaint in intervention.

(e) Appellant was entitled to intervene and resist the suit of the United States for an injunction against the [92] defendant Great Northern Railway Company, the said suit being based upon a claim of title to the oil, gas, and other minerals, but which in fact belonged to the Appellant.

II.

The court was in error in finding and concluding that to permit Appellant to intervene would con-

stitute a suit brought by him against the United States without its consent.

III.

The court was in error in finding and concluding that to permit Appellant to intervene would amount to substituting him for the defendant.

IV.

The court was in error in finding and concluding that Appellant's proposed pleadings in intervention constituted a cross bill against the United States.

V.

The court was in error in finding and concluding that Appellant's proposed pleadings asked for a decree quieting title to the oil, gas, and other minerals under the right of way in Appellant as against the United States.

VI.

The court was in error in finding and concluding that appellant's proposed pleadings constituted a suit against the property of the United States.

VII.

The court erred in finding and concluding that the possibility of the appellant being able to establish his right to the oil, gas, and other minerals underneath the railroad right of way, did not present any sound reason why the plaintiff should not proceed to restrain the defendant railway company from taking said oil, gas, and other minerals.

VIII.

The court erred in finding and concluding that, [93] although it preferred to dispose of the questions raised by the Appellant in order to avoid delay, it was prevented from so doing by the law.

IX.

The court erred in denying Appellant's Motion and Petition for Leave to Intervene in said action for the aforesaid reasons.

X.

The court erred in proceeding to a determination of the case and granting plaintiff's Motion for Judgment on the pleadings and ordering injunctive relief as prayed for in plaintiff's complaint without having permitted Appellant to intervene in said action and assert his claim and defense therein and thereto, as set forth in his proposed pleadings.

W. H. HOOVER
J. E. CORETTE, JR.
L. V. KETTER
Attorneys for Appellant, Raymond J. MacDonald, as Trustee of an Express Trust for Others.

[Endorsed]: Filed July 24, 1940. [94]

Thereafter, on August 1, 1940, Stipulation between Plaintiff and Defendant, for Amended Find-

ings of Fact and Conclusions of Law, was duly filed herein, in the words and figures following, towit:

[95]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the plaintiff and defendant in the above-entitled cause, acting through their respective attorneys of record, that the Findings of Fact and Conclusions of Law filed in the above-entitled cause on the 25th day of July, 1940, may be amended as follows, to wit:

1. By substituting the word "in" for the word "and" in the seventh line of paragraph II of the second Finding of Fact.

2. That the word "company" be inserted between the word "Railway" and the word "all" in the sixth line of the third Finding of Fact.

3. That the following sentence be added to the fifth Finding of Fact after the words "United States", the same being the last words in said finding number V. as now appear in the Findings of Fact and Conclusions of Law now on file, to wit:

> "In said notice the defendant advised the Secretary of the Interior of the United States that it intended to drill three wells upon the said right of way and to remove oil deposited thereunder, the oil removed from one of said wells to be used in its crude form for fuel upon locomotives of defendant operated over said right of way and upon other portions of defendant's line of railway; the oil from an-

other of said wells to be refined by defendant and the fuel oil obtained therefrom to be used upon such locomotives, while the more volatile portion would be sold commercially; and the oil removed from the third well to be sold commercially in its entirety."

4. That the word "and" appearing between the word "Montana" and the word "over" in the VII Finding of Fact be stricken out and that the words "except the right of way" be inserted in lieu thereof. [96]

5. That the Findings of Fact bearing number IX be stricken and that the substance thereof be added to paragraph VI of the Conclusions of Law in a new sentence following the word "purposes" in said paragraph.

6. That amended Findings of Fact and Conclusions of Law covering the aforesaid modifications be filed herein in lieu of the Findings of Fact and Conclusions of Law approved by the court and filed in this action under date of July 25, 1940.

Dated July 30, 1940.

JOHN B. TANSIL
United States Attorney
ROY F. ALLAN
Assistant United States Attorney
F. G. DORETY & T. B. WEIR
Attorneys for Defendant
By W. L. CLIFT

[Endorsed]: Filed August 1, 1940. [97]

Thereafter, on August 1, 1940, an Order for Amended Findings of Fact and Conclusions of Law, was duly filed herein, in the words and figures following, towit: [98]

[Title of District Court and Cause.]

ORDER

Whereas Findings of Fact and Conclusions of Law were duly made and entered by the Court in the above-entitled cause on July 25, 1940, and judgment duly rendered thereon on the same day; and

Whereas, by stipulation of counsel Amended Findings of Fact and Conclusions of Law were agreed upon and submitted, and the Court is of the opinion that said Amended Findings of Fact and Conclusions of Law should be made and filed in substitution of those heretofore filed and that the judgment heretofore rendered thereon should be based upon said Amended Findings of Fact and Conclusions of Law;

It is therefore ordered that said Amended Findings of Fact and Conclusions of Law be filed in substitution of the original Findings of Fact and Conclusions of Law heretofore filed, and that same be filed as of July 25, 1940, and that the said judgment heretofore filed be based upon said Amended Findings of Fact and Conclusions of Law.

By the Court;

CHARLES N. PRAY

Judge

Dated August 1st, 1940.

[Endorsed]: Filed & Ent. Aug. 1, 1940. [99]

Thereafter, on August 1, 1940, Amended Findings of Fact and Conclusions of Law was duly filed herein, in the words and figures following, towit:

[100]

[Title of District Court and Cause.]

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case coming on to be heard before the Honorable Charles N. Pray, Judge of the above-entitled court, in the City of Billings, State of Montana, on the 22nd day of June, 1939, upon the motion of the plaintiff for judgment on the pleadings, the plaintiff appearing by John B. Tansil, United States Attorney, Roy F. Allan, Assistant United States Attorney, and Aubrey Lawrence, Special Assistant to the Attorney General, the defendant appearing by F. G. Dorety, General Counsel and Vice President of the defendant, Great Northern Railway Company, intervener Raymond J. MacDonald, as trustee appearing by J. E. Corette, Jr., and L. V. Ketter, and argument being had and briefs filed, and the court being fully advised in the premises, hereby makes the following

FINDINGS OF FACT

I.

That this action was brought by the direction of the Attorney General of the United States and at the request of the Secretary of the Interior.

II.

That the defendant is a railway corporation organized under the laws of the State of Minnesota for the purpose of operating and maintaining a railroad and business incident thereto, and that the said Great Northern Railway Company has been at all times involved in this action operating and maintaining a railroad and engaged in part in the transportation of goods in interstate commerce. [101]

III.

That under the Act of March 3, 1875 (18 Stat. 482), the St. Paul, Minneapolis and Manitoba Railway Company, a railroad corporation, was granted a right of way through the public lands of the United States. That on the eleventh day of October, 1907, the St. Paul, Minneapolis and Manitoba Railway Company conveyed to the Great Northern Railway Company all its rights of property, including "various lands granted to it by the United States of America and by the State of Minnesota to aid in the construction of a railroad, hereinbefore described", etc. That the said Great Northern Railway Company is now operating and maintaining a railroad on the right of way over public lands granted to the St. Paul, Minneapolis and Manitoba Railway Company under the Act of March 3, 1875.

IV.

That a portion of said right of way, so granted and now in use by the Great Northern Railway Com-

pany in operating and maintaining a railroad, crosses Sections 7, 16, 17 and 18 in Township 33 North, Range 5 West, and Sections 1, 2 and 12 in Township 33 North, Range 6 West, all in Glacier County, State of Montana.

V.

That prior to the commencement of this action the defendant, the Great Northern Railway Company, claimed and asserted ownership of the oils and minerals underlying its right of way as aforesaid described, and the right to take and remove the same, and threatened to use portions of the right of way crossing the lands hereinbefore described for the purpose of drilling for and removing sub-surface oil and did serve upon the Secretary of the Interior of the United States a written notice of its intention to drill for and remove oil beneath the surface of its right of way crossing Sections 7, 16, 17 and 18 in Township 33 North, Range 5 West, and Sections 1, 2 and 12 in Township 33 North, Range 6 West, all in Glacier County, Montana, the same being the right of way obtained by the predecessor of the said Great Northern Railway Company under the Act of March 3, 1875, and did serve like notice upon the Attorney General of the United States. That in said [102] notice the defendant advised the Secretary of the Interior of the United States that it intended to drill three wells upon the said right of way and to remove oil deposited thereunder, the oil removed from one of said wells to be used in its crude form

for fuel upon locomotives of defendant operated over said right of way and upon other portions of defendant's line of railway; the oil from another of said wells to be refined by defendant and the fuel oil obtained therefrom to be used upon such locomotives, while the more volatile portion would be sold commercially; and the oil removed from the third well to be sold commercially in its entirety.

VI.

That no lease has at any time been issued to the defendant, the Great Northern Railway Company as authorized by the Act of May 21, 1930, 46 Stat. 373, to drill upon or remove deposits of oil and gas under the said right of way of the defendant, nor has any application therefor been at any time made.

[103]

From the foregoing Findings of Fact the court makes the following

CONCLUSIONS OF LAW

I.

That all the material allegations of the complaint have been sustained by competent proof.

II.

That the plaintiff is entitled to a judgment and decree as prayed for in the complaint.

III.

That jurisdiction to try and determine the issues in this case is vested in this court by revised statute

Sections 563 and 629 and amendments thereto now being Section 41, Title 28, U. S. Code.

IV.

That the defendant, Great Northern Railway Company is not entitled to and is not the owner of the gas, oils and minerals underlying its right of way crossing Sections 7, 16, 17, and 18 in Township 33 North, Range 5 West, and Sections 1, 2 and 12, Township 33 North, Range 6 West, in Glacier County, State of Montana.

V.

That the Act of March 3, 1875, 18 Stat. 482, does not grant to railroad corporations any right, ownership or claim in or to the gas, oils and minerals underlying the surface of the rights of way so granted and that the said act granted only an easement and right to cross the public lands of the United States and to use the surface of said right of way for railroad purposes.

VI.

That the legislative history connected with the passage of the Act of March 3, 1875, 18 Stat. 482, discloses that the Congress of the United States in passing the said act and in providing for the granting of rights of way to railroad companies intended to grant only the right to cross the public lands of the United States and did not intend to grant to any [104] railroad company securing a right of way

under the provisions of said act the ownership of the gas, mineral and oil deposits underlying the surface of said right of way, and intended that the grant of said right of way was solely an easement to occupy and use the surface of the right of way, crossing public lands of the United States for railroad purposes. That at the time of the passage of the Act of May 21, 1930, 46 Stat. 373, the Congress of the United States asserted the ownership of the United States to the gas, oil and minerals underlying the surface of the rights of way granted under the Act of March 3, 1875, and affirmed the intention of Congress expressed at the time of the passage of the Act of March 3, 1875, to the effect that no right was granted to any railway company securing a right of way under that act other than the crossing of the public lands of the United States and the occupancy and use of the surface of the granted right of way for railroad purposes.

VII.

That the plaintiff is entitled to a permanent injunction restraining and enjoining the Great Northern Railway Company from in any manner using the right of way granted as herein described for the purpose of drilling for or removing oil, gas and minerals underlying its right of way.

VIII.

That the plaintiff is entitled to the costs and disbursements of this action.

That judgment be entered accordingly.

CHARLES N. PRAY,
Judge.

Dated Aug. 1st, '40.

[Endorsed]: Filed August 1, 1940.

[105]

Thereafter, on July 25, 1940, Judgment of Plaintiff was duly filed herein, in words and figures following, towit: [106]

In the United States District Court for the District of Montana

UNITED STATES OF AMERICA,
Plaintiff

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Defendant,

RAYMOND J. MacDONALD, as Trustee of an express trust for others,
Intervener.

JUDGMENT

The above case coming on to be heard before the Honorable Charles N. Pray, Judge of the above entitled court, in the City of Billings, State of Montana, on the 22d day of June, 1939, upon the motion

of the plaintiff for judgment on the pleadings, the plaintiff appearing by John B. Tansil, United States Attorney, Roy F. Allen, Assistant United States Attorney, and Aubrey Lawrence, Special Assistant to the Attorney General, the defendant appearing by F. G. Dorety, General Counsel and Vice President of the defendant Great Northern Railway Company, intervener Raymond J. MacDonald as trustee appearing by J. E. Corette, Jr., and L. V. Ketter, and argument being had and briefs filed, and the court having heretofore made findings of fact and conclusions of law in favor of the plaintiff it is hereby ordered, adjudged and decreed that the plaintiff have a judgment as prayed for in its complaint, and that the defendant, the Great Northern Railway Company, be and it is hereby restrained and enjoined from in any manner using the right of way granted under the act of March 3, 1875, 18 Stat. 482, for the purpose of drilling for or removing oil, gas and minerals underlying the right of way and is hereby restrained and enjoined from drilling for or removing oils, gas, or minerals beneath the surface of its right of way and is hereby restrained and enjoined from exercising any control, dominion, use or ownership of the oils, gas, and minerals underlying its right of way as described in the complaint in [107] this action, except under a lease issued pursuant to the provisions of the act of May 21, 1930, 46 Stat. 373, and that plaintiff have judgment for its costs and disbursements hereby taxed in the sum of $

By the Court

CHARLES N. PRAY

Judge.

Dated July 25, 1940.

[Endorsed]: Filed & Ent. July 25, 1940.

[108]

Thereafter, on August 3, 1940, Defendant's Notice of Appeal to Circuit Court of Appeals was duly filed herein, in the words and figures following, to-wit: [109]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS.

Notice is hereby given that Great Northern Railway Company, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on July 25th, 1940.

F. G. DORETY

Address: St. Paul, Minnesota

T. B. WEIR

W. L. CLIFT

Address: Helena, Montana.

Attorneys for Appellant (Defendant above named) Great Northern Railway Company.

[Endorsed]: Filed Aug. 3, 1940.

[110]

Thereafter, on August 3, 1940, Defendant's Bond on Appeal was duly filed herein, in the words and figures following, towit: [111]

[Title of District Court and Cause.]

BOND ON APPEAL.

Know all men by these presents: that

Whereas, the defendant in the above-entitled cause has appealed, or is about to appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final judgment or decree entered in said cause in the above-entitled Court on the 25th day of July, 1940, in favor of plaintiff and against the defendant, on plaintiff's motion for judgment on the pleadings, the Court having duly made amended findings of fact and conclusions of law in favor of the plaintiff and against said defendant, by which judgment or decree defendant was restrained and enjoined from in any manner using its right-of-way, granted under the Act of March 3, 1875, 18 Stat. 482, for the purpose of drilling for or removing oil, gas, or minerals underlying its right-of-way referred to in the complaint, and from exercising any control, dominion, use or ownership of the oils, gas and minerals underlying said right-of-way, as described in the complaint, except under a lease issued pursuant to the provisions of the Act of May 21, 1930, 46 Stat. 363, and that plaintiff have judgment for its costs and disbursements.

Now, therefore, in consideration of the premises, and of such appeal, Continental Casualty Company,

a corporation duly organized and existing under and by virtue of the laws of the State of [112] Indiana (with capital and assets provided for in an Act of the Sixth Legislative Assembly of the State of Montana, entitled "An Act to Permit Foreign Surety Corporations to do Business in this State, and Regulating the Method Thereof", which said corporation has complied with all the provisions of said Act and all Acts amendatory thereof or supplemental thereto, and is entitled to do business in the State of Montana as a surety), does hereby undertake and promise, on the part of said appellant, that said appellant will pay all costs which may be awarded against it if said appeal is dismissed or such judgment is affirmed, or all such costs as said United States Circuit Court of Appeals for the Ninth Circuit may award against it if said judgment is modified, not exceeding the sum of Two Hundred and Fifty and No/100 Dollars ($250.00), for the payment of which amount well and truly to be made, the said Continental Casualty Company binds itself, its successors and assigns, firmly by these presents.

In witness whereof, the said Continental Casualty Company has caused these presents to be executed by its duly and legally appointed and authorized Attorney-in-Fact, this 3rd day of August, 1940.

CONTINENTAL CASUALTY COMPANY.

By: F. [Illegible]

Its Attorney-in-Fact.

[Endorsed]: Filed August 3, 1940.

[113]

Thereafter, on August 3, 1940, Statement of Points to be relied upon by Appellant Great Northern Railway Company, on Appeal was duly filed herein, in the words and figures following, towit:

[114]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT ON APPEAL

Upon the appeal in the above entitled action, appellant (defendant above named) intends to rely upon the following points;

(1) that the Act of Congress of March 3, 1875, (18 Stat. L. 482) under which appellant's predecessor obtained its title to the railroad right of way upon which appellant is enjoined by the decree in this action from drilling for or removing oil, must be construed as having granted a title in fee simple to the entire strip of land included in the right of way, and including all oil and minerals underlying said strip of land, subject only to the qualification or limitation that such title shall continue for so long as said strip shall be used for railroad purposes;

(2) that the ownership of such title which is now vested in appellant, includes (a) the right to drill for and remove, for any purpose, the oil underlying said strip of land, or (b) the right to drill for and remove the oil underlying said strip of land, provided that, after refining and removing volatile portions thereof, the remaining fuel oil shall be used

in railroad operations over said strip of land, or (c) the right to drill for and remove the oil underlying said strip of land, provided that all of the oil so removed shall be used as fuel in the operation of [115] railroad locomotives along said strip of land;

(3) that the injunction prayed for by plaintiff should have been denied and the action dismissed with judgment in favor of the defendant.

F. G. DORETY
Address: St. Paul, Minnesota.

T. B. WEIR
W. L. CLIFT
Address: Helena, Montana.
Attorneys for Appellant (Defendant above named) Great Northern Railway Company.

[Endorsed]: Filed Aug. 3, 1940. [116]

Thereafter, on August 3, 1940, Appellant's designation of portions of record to be contained in record on appeal was duly filed by Great Northern Railway Company, in the words and figures following, to wit: [117]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL.

The appellant, defendant above named, hereby designates the following portions of the record and proceedings in the above-entitled action to be contained in the record on appeal:

Complaint of Plaintiff.

Answer of Defendant to Plaintiff's Complaint.

Motion by plaintiff for judgment on the pleadings, and Notice of said motion.

Minutes of the Court of hearing held on June 22, 1939.

Opinion of the Court, filed April 25, 1940.

Stipulation entered into between plaintiff and defendant for filing of amended findings of fact and conclusions of law.

Order of Court permitting filing of Amended Findings of Fact and Conclusions of Law pursuant to stipulation.

Amended Findings of Fact and Conclusions of Law.

Final Judgment or decree.

Notice of Appeal.

Bond on Appeal.

Statement of Points to be relied upon by appellant on appeal. [118]

Designation of portions of record and pro-

ceedings to be contained in the record on appeal.

F. G. DORETY
Address: St. Paul, Minnesota.
T. B. WEIR
W. L. CLIFT
Address: Helena, Montana.
Attorneys for Appellant (Defendant above named) Great Northern Railroad Company.

[Endorsed]: Filed August 3, 1940. [119]

Thereafter, on August 6, 1940, an Order Extending Time to File Transcript on Appeal in United States Circuit Court of Appeals was duly entered herein, being in the words and figures following, towit: [120]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE TRANSCRIPT ON APPEAL IN UNITED STATES CIRCUIT COURT OF APPEALS

For good cause appearing, it is ordered by the court that the time for filing the Transcript of Record on Appeal in the United States Circuit Court of Appeals for the Ninth Circuit be and hereby is extended to and including October 9th, 1940.

Dated and entered August 6th, 1940.

CHARLES N. PRAY
United States District Judge
for the District of Montana

[Endorsed]: Entered Aug. 6, 1940. [121]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the District Court of the United States for the District of Montana, do hereby certify to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 122 pages, numbered consecutively from 1 to 122 inclusive, is a full, true and correct transcript of all matter designated by the parties as the record on appeal in case Number 32, United States vs. Great Northern Railway Company, et al, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Twenty-eight and 80/100ths Dollars, ($28.80), and have been paid by the appellants.

Witness my hand and the seal of said court at Great Falls, Montana, this 27th day of August, A. D. 1940.

[Seal] C. R. GARLOW,
Clerk as aforesaid.
By MAX JENKS,
Deputy. [122]

[Endorsed]: No. 9624. United States Circuit Court of Appeals for the Ninth Circuit. Raymond J. MacDonald, as Trustee of an express trust for others, Appellant, vs. United States of America, Appellee. Great Northern Railway Company, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Montana.

Filed August 30, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth District

No. 9624

UNITED STATES OF AMERICA,

Appellee,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Appellee,

RAYMOND J. MacDONALD, as Trustee of an Express Trust for Others,

Appellant.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON HIS APPEAL, AND DESIGNATION OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF

Comes now, Raymond J. MacDonald, as Trustee of an Express Trust for others, the above named Appellant, and for his Statement of the Points on which he intends to rely on his appeal adopts his statement of such Points appearing and contained in the certified original transcript of the record of the above entitled cause on file in the office of the Clerk of the above entitled court.

Said Appellant designates the entire certified record as being in his opinion necessary for the con-

sideration of his said Points and asks that the same be printed in its entirety.

Dated this 4th day of September, 1940.

J. E. CORETTE, JR.
L. V. KETTER
W. H. HOOVER
J. V. DWYER
Attorneys for Appellant Raymond J. MacDonald, Trustee of an Express Trust for Others.

State of Montana,
County of Silver Bow—ss.

Eda Mandich, being first duly sworn, deposes and says:

That she is a Clerk in the office of L. V. Ketfer, one of the attorneys for the Appellant in the foregoing entitled action; that she duly served the foregoing Statement of Points and Designation of the Parts of the Record Necessary for the Consideration Thereof, by enclosing a true and correct copy thereof in an envelope which was thereupon sealed and addressed to John B. Tansil, United States Attorney, at Billings, Montana, one of the Attorneys for the Appellee, United States of America; by enclosing a true and correct copy thereof in an envelope which was thereupon sealed and addressed to T. B. Weir, at Helena, Montana, one of the attorneys for the Appellee, Great Northern Railway

Company; and that with postage fully prepaid thereon the said envelopes and their contents were on said day deposited in the United States Post-office at Butte, Montana. Appellant further states that the above mentioned addresses are the postoffice addresses, places of business, and residences of the said attorneys for the respective appellees.

EDA MANDICH

Subscribed and sworn to before me this 4th day of September, 1940.

[Seal] P. J. BERGET

Notary Public for the State of Montana

Residing at Butte, Montana

My commission expires November 25, 1942

In the United States Circuit Court of Appeals,
for the Ninth Circuit.

No. 9624

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

and

RAYMOND J. MacDONALD, as Trustee of an Express Trust for Others,

Intervener and Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT, GREAT NORTHERN RAILWAY COMPANY, INTENDS TO RELY ON ITS APPEAL, AND DESIGNATION OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THERFOF

Comes now Great Northern Railway Company, Defendant and Appellant in the above-entitled cause, and for its statement of the points on which it intends to rely on its appeal, adopts its statement of such points set forth and contained in the original transcript of the record of the above-entitled cause as certified by the Clerk of the United States District Court, and now on file in the office of the Clerk of the above-entitled Court.

Said appellant, Great Northern Railway Company, also designates the entire record, so certified by said Clerk of the United States District Court, to be printed, that being the record relied upon by said appellant on its appeal, such entire record being necessary, in the opinion of this appellant, for the proper consideration by the Court of the points hereinabove referred to.

Dated this 6th day of September, 1940.

F. G. DORETY
Attorney for Appellant, Great Northern Railway Company, St. Paul, Minn.

T. B. WEIR
W. L. CLIFT
Attorneys for Appellant, Great Northern Railway Company, Helena, Montana.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT

State of Montana,
County of Lewis and Clark—ss.

G. W. Pfaff, being first duly sworn, deposes and says:

That he is a citizen and resident of the State of Montana, over twenty-one (21) years of age, and that on the 6th day of September, 1940, he deposited in the United States Post Office at Helena, Mon-

tana, a true copy of the foregoing Statement of Points on which Appellant, Great Northern Railway Company, Intends to Rely on its Appeal, and Designation of the Parts of the Record Necessary to be Printed for the Consideration Thereof, in a sealed envelope, with first-class postage thereon fully prepaid, and addressed to John B. Tansil, United States District Attorney, Billings, Montana; and another true copy of said Statement of Points and Designation of Parts of the Record, in a similarly sealed envelope, with first-class postage thereon fully prepaid, and addressed to J. E. Corette, Jr., and L. V. Ketter, Attorneys at Law, Butte, Montana. That said John B. Tansil is attorney for Appellee, United States of America, and has his office and resides at said Billings, Montana, and said J. E. Corette, Jr., and L. V. Ketter are attorneys for Intervener and Appellee, Raymond J. MacDonald, and have their office at and reside in said Butte, Montana.

That T. B. Weir and W. L. Clift are attorneys for Appellant in said cause, and have their office in and reside at Helena, Montana, and that there is a regular communication by mail between said City of Helena and said City of Billings, Montana, on the one hand, and between said City of Helena, Montana, and said City of Butte, Montana, on the other hand, and that affiant is in no way interested in said cause.

G. W. PFAFF

Subscribed and sworn to before me this 6th day of September, 1940.

[Seal] JOHN J. MITCHKE
Notary Public for the State of Montana,
Residing at Helena, Montana.

My Commission expires May 1st, 1942.

[Endorsed]: Filed Sept. 10, 1940. Paul P. O'Brien, Clerk.

No. 9624

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RAYMOND J. MacDONALD, as Trustee of an express trust for others,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeals from the District Court of the United States for the District of Montana.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 548 SANSOME STREET, SAN FRANCISCO

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, February 28, 1941.

Before: Wilbur, Garrecht and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal of Great Northern Railway Company herein argued by Mr. F. G. Dorety, General Counsel, Great Northern Railway Company, counsel for said appellant, and by Mr. Vernon L. Wilkinson, Attorney, Department of Justice, counsel for appellee;

Further ordered appeal of Raymond J. McDonald, herein argued by Messrs. J. E. Corette, Jr., and L. V. Ketter, counsel for said appellant, and by Mr. Vernon L. Wilkinson, Attorney, Department of Justice, counsel for appellee, and the appeals herein submitted to the court for consideration and decision, with leave to counsel for appellant Great Northern Railway Company to file supplemental memorandum, if so advised.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, May 8, 1941.

Before: Wilbur, Garrecht and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF DECREE

By direction of the Court, ordered that the typewritten opinion and dissenting opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a decree be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeals from the District Court of the United States for the District of Montana.

OPINION

Before: Wilbur, Garrecht and Healy,
Circuit Judges.

Healy, Circuit Judge:

The United States prevailed below in a suit to enjoin the Great Northern Railway Company from drilling for or removing oil, gas and minerals un-

derlying its right of way, except pursuant to the provisions of the act of May 21, 1930, 46 Stat. 373, which authorizes leases for such purpose.

The Great Northern extends westerly from Minnesota to Puget Sound. It has numerous branch lines. In 1891 its predecessor, the Saint Paul, Minneapolis and Manitoba Railroad Company, pursuant to the general right of way act of March 3, 1875, 18 Stat. 482,[1] filed with the department of the Interior

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[1] "Chap. 152. An act granting to railroads the right-of-way through the public lands of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Section 2. That any railroad company whose right of way, or whose track or roadbed upon such right-of-way, passes through any canyon, pass, or defile, shall not prevent any other railroad company

a map of definite location of that portion of its road passing through Glacier County, Montana."[1] In 1907 that company conveyed all its rights of property to the Great Northern. With the discovery of oil in Glacier County on lands adjacent to the right of

1 We are not advised of the date of filings relating to other portions of the right of way.

from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: Provided, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

Sec. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act to aid in the construction of a railroad and telegraph line from the

way, the nature of the estate in the land granted by Congress for right of way purposes has become a question of considerable importance. The complaint and answer in the suit were so drafted as

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Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

Section 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

Sec. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

Sec. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved, March 3, 1875."

to present the question whether the railroad owns the underlying minerals, or whether by the terms of the 1875 act subsurface rights were reserved to the United States. The court granted the government's motion for judgment on the pleadings, thus resolving the dispute in favor of the United States.

Appellant MacDonald sought leave to intervene in the trial court, and from the denial of his petition he appeals. His grievance will be considered later in the opinion.

Counsel have gathered in the briefs a wealth of material bearing on the subject of the nature of a railroad's interest in its right of way. It is not our purpose, however, to give more than passing notice to the authorities cited; the search need not take us so far afield. Enough to say that as a general rule a railroad company is recognized as having something of greater dignity than the easement known at common law. Its right to the exclusive occupancy of the surface, and so much of the subsurface as is essential for railroad purposes, has been said to be as absolute as that of an owner in fee, subject only to the possibility of loss or termination of the right by reason of non-user. Most of the modern decisions in the states go no farther than to recognize an exclusive easement or a qualified fee in the surface. For good statements of the view see Pennsylvania S. Valley R. Co. v. Reading Paper Mills, 149 Pa. 18, 24 Atl. 205; Kansas C. R. Co. v. Allen, 22 Kans. 285; Smith v. Hall (Ia.) 72 N. W. 427, 428. On the other hand, counsel for the Great

Northern call attention to many state statutes or special acts, antedating 1875, permitting railroad companies to acquire a fee simple estate in their rights of way. It is claimed that the majority of the not very numerous state decisions upon this question, prior to 1875, upheld the view that a railroad has the fee in the land over which its right of way passes.[2] We assume this to be true.

So much for the general law on the subject. It is obvious that much depends upon the facts of each case, the terms of the governing statute or the wording of the particular grant or conveyance. Cf. Carter Oil Co. v. Welker, 112 Fed. (2nd) 299.

It is the contention of the Great Northern that the estate conveyed by the various federal grants is a fee simple ownership in the land itself, subject only to the condition subsequent that it be used for railroad purposes. For this proposition it relies confidently on decisions of the Supreme Court in which the estate or interest acquired is described as a limited fee. Thus in Northern Pacific Ry. Co. v. Townsend, 190 U. S. 267, the court said of the right of way granted to the Northern Pacific under the act of July 2, 1864, 13 Stat. L. 365, that "in effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." Similar lan-

[2] For authorities dealing with the general subject see footnote to Magnolia Petroleum Co. v. Thompson, 106 Fed. (2nd), 217, 227.

guage is found in other opinions of the court.[3] It would serve no useful purpose to undertake here a statement of the facts of these cases or of the way in which the question of title arose; enough to say that in none of them was the court confronted with the question of the ownership of underlying minerals. We do not believe the holdings are decisive of that question. So far, however, as concerns the surface area embraced in the federal right of way grants, it may be taken as settled that the title of the railroads is the equivalent of a fee, limited only by the possibility of reverter. One of this group of cases, Rio Grande Western R. Co. v. Stringham, 239 U. S. 44, directly involves the 1875 act, and special consideration will be given it later in the opinion.

The grants prior to 1871 included extensive acreages in addition to the right of way. The largest, the donation to the Northern Pacific, embraced the 20 alternate odd-numbered sections of public lands

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[3]Missouri K. & T. R. Co. v. Roberts, 152 U. S. 114; Missouri K. & T. R. Co. v. Oklahoma, 271 U. S. 303; Noble v. Oklahoma City, 297 U. S. 481, 494; Clairmont v. United States, 225 U. S. 551, 556; Buttz v. Northern Pacific R. Co., 119 U. S. 55, 66; Choctaw O. & G. R. Co. v. Mackey, 256 U. S. 531, 538; Noble v. Union River Logging R. Co., 147 U. S. 165; United States v. Michigan, 190 U. S. 379; Northern Pacific R. Co. v. Ely, 197 U. S. 1; Stalker v. O. S. L., 225 U. S. 142; Great Northern R. Co. v. Steinke, 261 U. S. 119. Compare Railway Co v. Alling, 99 U. S. 463, 475 (1878); Smith v. Townsend, 148 U. S. 490, 498-499 (1893).

on each side of the road, or a total of about 40,000,000 acres. It is a matter of history that this lavish policy had met with public disfavor prior to the adoption of the general right of way act of 1875[4] The change in public sentiment is reflected in a resolution passed by the lower house of Congress March 11, 1872. The resolution declares that in the judgment of the house, "the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law."[5] At the time of the passage of the general right of way act the title to the great bulk of the lands in the western states and territories was in the United States, and if railroad construction was to continue at all it was essential to grant a right of way over the public domain for this purpose. The 1875 grant was not in the nature of a bounty; rather it was legislation calculated to promote settlement and to enhance the value of the public domain made accessible by the building of railways. United States v. Denver & Rio Grande

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[4] See "Land Grants" 9 Encyclopaedia of the Social Sciences (1933), page 35; "Land Grants to Railways", 3 Dict. Am. Hist. p. 237 (1940).

[5] Cong. Globe, 42nd Congress, 2nd sess. 1585 (1872). Cf. also R. Rept. No. 10, 43rd Cong., 2nd sess. (1874), p. 1.

Ry. Co., 150 U. S. 1. At the outset, it is not lightly to be assumed that Congress intended to grant rights more extensive than those necessary to enable the roads to build over the public land.

We turn now to the provisions of the act. It opens with the statement that "the right of way through the public lands of the United States is hereby granted to any railroad company * * * to the extent of one hundred feet on each side of the central line of said road * * *" Section 4 provides for filing with the local register of a profile of the road, and for the notation of the same upon the plats in his office after approval by the Secretary of the Interior. It was early held by the Secretary that the 4th section provides a method of securing the benefits of the act in advance of construction; and that in those instances where the road had actually been built over the public land it was unnecessary to file a map of definite location. Dakota C. R. Co. v. Downey, 8 L. D. 115. This administrative holding was followed by the court in Jamestown & Northern R. Co. v. Jones, 177 U. S. 125, and was later applied in Stalker v. O. S. L. R. Co., 225 U. S. 142.

The 4th section, after authorizing the procedure above mentioned, significantly provides that "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." A provision somewhat similar appears in the grant to the Portland, Dalles and Salt Lake Railroad Company, 17 Stat. 52, approved April 12,

1872; but no provision of the kind is found in any of the earlier acts. Elaborate attempts are made to explain away this language, as, for example, by saying that it is a mere statement of the obvious; but the clause ought to be taken as meaning what it says. If by force of the filing and approval of the profile Congress intended that the fee simple title should vest in the railroad, surely language so utterly incompatible would not have been employed in the direction for future disposition immediately following. Apter words to indicate the intent to convey an easement would be difficult to find. We need not labor the point. The act is to be read as a whole and effect given, if possible, to all its provisions. While in respect of its affording a special means of claiming the benefits of the act section 4 may be said to have a special purpose, there is no persuasive reason for believing that the clause in question does not qualify as well as illuminate the entire statute.

The grantee is entitled to have the act liberally construed to effect the purpose for which it was enacted. United States v. Denver & Rio Grande Railway Co., supra. Otherwise it is to be construed strictly in conformity with the rule that grants from the sovereign should receive a construction favorable to the claim of the government rather than that of the grantee. "Nothing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather

than the grantee." Northern Pacific Railway Co. v. Soderberg, 188 U. S. 526. And see Caldwell v. United States, 250 U. S. 14, 20-21. A grant of the underlying minerals would have been an obvious subsidy and it was plainly not the purpose of Congress to subsidize the roads.[6]

As noted in Northern Pacific Ry. Co. v. Soderberg, supra, in the grants subsequent to 1860, embracing lands in the then unsurveyed and little known territories, a reservation was invariably made of lands suspected of being rich in metals. The Northern Pacific grant, for example, excluded mineral lands, although at the same time it excluded coal and iron from the definition of minerals. True, the reservation contained in these grants was of the land itself, not of the underlying minerals; and necessarily the right of way grants were intended to be effective whether or not the way selected should extend over mineral lands. But for this very reason the settled policy adds color to the belief that the general act of 1875 was intended as granting no more than a right of passage.

This view of the act is in line with the interpretation almost uniformly given it by the department of the Interior. The right of way circular issued

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[6]The right given by the act to take from the adjacent public lands material and timber necessary for construction has been held not to authorize the taking of timber for use in the building of rolling stock for operating purposes. United States v. D. & R. G. Ry. Co., supra.

January 13, 1888 (12 L. D. 423) states that "the act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the 'right of way' or the grounds selected for depot purposes.[7] It is a right of use only, the title still remaining in the United States. * * * All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases." The verbiage is repeated in the regulations of March 21, 1892, 14 L. D. 338. The phraseology of the revision of November 4, 1898 (27 L. D. 663, 664) is slightly different, but the grant is said to be merely of a right of use for necessary railroad purposes, the fee remaining in the United States. Perhaps out of deference to the language of the Supreme Court in Northern Pacific Ry. Co. v. Townsend, supra, the grant is described in the revision of February 11, 1904, 32 L. D. 481, 482-483, as "a base or qualified fee giving the possession and right of use of the land for the purposes contemplated by law." But in the regulations of May 21, 1909 (37 L. D. 787, 788), the notion disappears that the estate granted is a base or qualified fee, and the original thought is resumed that the railroad takes an easement only,

[7]The present case does not involve the land granted for station and kindred purposes; and concerning that phase of the act we express no opinion.

the fee simple title remaining in the United States.[8] As was to be expected, the rulings of the Department subsequent to 1915 become confused and uncertain.

We turn now to the decision in Rio Grande Western Ry. Co. v. Stringham, supra. The opinion was handed down in 1915. The dispute concerned a strip of land claimed by the railroad company as a right of way under the act of March 3, 1875. The defendants asserted title under a patent for a placer mining claim. On appeal to the Utah supreme court a judgment in favor of the defendants was reversed and the case remanded with a direction to "enter a judgment awarding to the plaintiff title to a right of way over the lands in question 100 feet wide on each side of the center of the track." The trial court entered judgment accordingly. The railroad company again appealed insisting that the judgment was inadequate, and that it had a fee simple title. The court said that appellant's grievance should have been asserted by petition for a rehearing and declined to modify the judgment. On appeal to the Supreme Court of the United States the judgment was affirmed. In the course of its affirming opinion the latter court said: "The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that

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[8]See also, as further illustrative of the administrative interpretation, 32 L. D. 33 (1903); 35 L. D. 495 (1907); 28 L. D. 412 (1899).

the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."

On its facts the case is distinguishable. If subsurface rights had been in issue, the decision would compel us to reverse the present judgment; but subsurface rights were not involved, and the judgment of the Utah court was properly affirmed as it stood. The government was not represented in the suit and we are informed that the defendants themselves filed no brief. Not having its attention called to significant differences between this and earlier grants with which it had dealt, the court merely paraphrased the language of former opinions. Now we are asked to accept the dicta as gospel, despite its manifold shortcomings even as dicta. We choose to believe the statute is a safer guide.

The act of May 21, 1930, 46 Stat. 373, 30 USCA §301, provides that the Secretary of the Interior may, if he deems it in the public interest, "lease deposits of oil and gas in or under lands embraced in railroad or other rights of way acquired under any law of the United States, whether the same be a base fee or mere easement." This statute is little more than a self-serving declaration, as it was enacted at a time when the ownership of the underlying oil had become a subject of controversy. However, an earlier act of June 26, 1906, 34 Stat. 482, is of some value in the interpretation of the 1875 grant. That act, which declared a forfeiture of un-

used rights of way, refers to the grant as an easement.

The petition of appellant MacDonald for leave to intervene alleged that a certain quarter section of land, described in the government's complaint as being part of the land crossed by the Great Northern's right of way, had been the subject of a homestead patent to his predecessor containing no exception of the oil or other minerals under it. The whole area within the exterior boundaries of the quarter section had; petitioner averred, been included in the patent, subject to the railroad's right of way. It was alleged that both the government and the Railroad Company claim title to the minerals underlying the right of way as it crosses this quarter section, but that the ownership thereof is in the petitioner by virtue of the homestead patent; that the interest of petitioner would not be adequately represented by plaintiff or defendant, and that petitioner is so situated as to be adversely affected by a decision arrived at without the complete presentation of his interest. The petitioner further alleged that his claim involved questions of law which were the same as those involved in the case between the plaintiff and the defendant, and that under the provisions of Rule 24, (a) and (b), of the Rules of Civil Procedure, petitioner was entitled to come in. Leave was denied.

We see no error in the ruling. The sole issue in the case was whether the general right of way grant included subsurface minerals. The entire right of

way, so far as it rested on the grant, was involved in the suit. The government alleged only that under the act the Great Northern had acquired no interest in the underlying oil deposits, but that these remained the property of the United States, and subject to its control and disposition. In no sense was the interest of the United States adverse to that of MacDonald. For the purpose of the suit the two interests were identical. A decision against the railroad would determine only the basic question, leaving the rights of subsequent patentees of the government to future adjudication. On the other hand, were the holding to be against the government, the decision would mean that the United States retained no mineral rights which it could thereafter have conveyed to the homesteaders and other patentees along the right of way. To that extent, only, petitioner has an obivous interest in the suit and in an outcome favorable to the government.

Subdivision (a) of Rule 24, permitting intervention as a matter of right, provides, so far as pertinent here, that the application shall be granted "when the representation of applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by the judgment in the action." Both conditions must be shown to exist. There is no reason to believe that the government's representation of MacDonald's interest is inadequate here, or that it was inadequate below. For that matter, both here and below, he presented an elaborate brief on the merits of the case and was

heard thereon as fully as though he had been allowed to intervene. On the whole, the government would seem to have a vastly greater interest in the success of its suit than the intervener. Other patentees along the right of way have the same claim of right to intervene as MacDonald has. The government argues with much force that to determine subsequent rights it would be necessary to consider numerous types of patents and statutes and many classification orders, all of which would become immaterial if the decision in the main case were adverse. The purpose of the action was to determine once and for all the scope of the 1875 grant, and this ought to be done before an attempt is made to litigate the effect of subsequent patents.

Assuming that denial of leave to intervene under subdivision (b) of the Rule is reviewable, what has been said disposes of that branch of the inquiry.

Affirmed.

Wilbur, Circuit Judge:

I dissent. The United States brought this action to enjoin the Great Northern Railway from drilling for and removing oil and gas underlying its right of way upon the ground that the right to develop such oil and gas was not granted by the United States to the defendant Railway Company by the act of March 3, 1875 (18 Stat. 482), under which the right of way was secured by the St. Paul, Minneapo-

lis and Manitoba Railway Co., which was subsequently conveyed by it to the Great Northern Railway Company. The trial court granted the injunction.

The principal question involved on this appeal is whether or not the act granting the right of way entitled the grantee to use the land within its right of way for the purpose of producing oil.

The title granted by various acts of Congress to railroads for their rights of way is variously referred to as a terminable or base fee, a revocable fee, a fee on condition.

However characterized, the view that the right to develop oil is granted by the private grant of a railroad right of way unless limited to an easement for mere right of passage, is supported by a number of decisions: Nelson v. T. & P. R. Co., 92 So. 754, 152 La. 117; Crowell v. Howard, (Tex.) 200 S. W. 911; Quinn v. Pere Marquette R. Co., 239 N. W. 376, 256 Mich. 143; Brightwell v. Intl. Grt. N. R. Co., 49 S. W. (2d) 437, 121 Tex. 338; Kynerd v. Hulen, 5 F. 2d 160 (5th Cir); Atty. General v. Pere Marquette R. Co., 248 N. W. 860, 262 Mich. 431; Rice v. Clear Spring Coal Co., 186 Pa. St. 64, 40 Atl. 149; Stephenson v. St. L. S. W. R. Co., 181 S. W. 568; Stevens v. Galveston H. & S. A. R. Co., 212 S. W. 639; Carter Oil Co. v. Welker, 112 F. 2d. 299. Similarly where land is granted for use for school purposes it has been held that the grantee cannot be enjoined from drilling for or removing oil under-

lying the land. Dees v. Chauvronts (Ill), 88 N. E. 1011, 240 Ill. 486.

We are concerned, however, with the intent of Congress as disclosed by the Act of March 3, 1875, supra, making an offer to grant a right of way across public land to any railroad desiring to cross the public domain which complies with the terms of the act concerning the location of its railroad. The immediate question is whether Congress intended to reserve the right to produce oil from the lands within the right of way either for its own use or for conveyance to subsequent patentees or lessees. As stated in the main opinion the government concedes that in many prior grants of rights of way to railroads, it was the intention of Congress to convey a fee "limited only by the possibility of reverter". The view of the courts thus conceded, may be appropriately stated by reference to the decision of the Supreme Court in New Mexico v. United States Trust Co., 172 U. S. 171, where it had under consideration the right of the territory to tax improvements upon the railroad right of way granted by Act of Congress of July 27, 1866, 14 Stat. 292, which depended upon the nature of the title granted to the railroad company, one side contending that it gave a mere right of passage and the other that the fee was granted or, if not granted, "such a tangible and corporeal property was granted, that all that was attached to it became a part of it and partook of its exemption from taxation." Referring to a

prior decision of the Supreme Court on that subject the court said:

"So this court in Missouri, Kansas & Texas Railway v. Roberts, 152 U. S. 114, passing on a grant to one of the branches of the Union Pacific Railway Company of a right of way two hundred feet wide, decided that it conveyed the fee. The effect of this decision is attempted to be avoided by saying that the distinction between an easement and the fee was not raised." In reply to that argument, the court said: "The language of Mr. Justice Field, who delivered the opinion of the court, would be unaccountable else. The difference between an easement and the fee would not have escaped his attention and that of the whole court, with the inevitable result of committing it to the consequences which might depend upon such difference."

The decision on the subject of the interest granted in the right of way is stated as follows:

"But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property."

Some of the acts granting rights of way to railroads prior to passage of the act of March 3, 1875, supra, are as follows:

Atlantic and Gulf, and Mobile and Ohio, March 3, 1849, 9 Stat. 771, 772.

Illinois Central Grant, September 20, 1850, 9 Stat. 466.

Union Pacific Grant, July 1, 1862, 12 Stat. 489.

Amended Union Pacific Grant, July 2, 1864, 13 Stat. 356.

Northern Pacific Grant, July 2, 1864, 13 Stat. 365.

Placerville Grant, July 13, 1866, 14 Stat. 94.

Leavenworth City Grant, July 23, 1866, 14 Stat. 212.

California & Oregon R. R. Grant, July 25, 1866, 14 Stat. 239.

Atlantic & Pacific R. R. Grant, July 27, 1866, 14 Stat. 292.

Stockton R. R. Grant, March 2, 1867, 14 Stat. 548.

Texas & Pacific R. R. Grant, March 3, 1871, 16 Stat. 573.

Green Bay and Lake Pepin R. R. Grant, March 3, 1871, 16 Stat. 588.

Portland, Dalles & Salt Lake R. R. Grant, April 12, 1872, 17 Stat. 52.

Central Pacific R. R. Grant, Feb. 5, 1875, 18 Stat. 306.

Assuming, then, that during the period in which these earlier acts were passed it was the intent of Congress by the use of the phrase "the right of way through public lands is granted" to grant a fee it follows that it was not the intention of Congress to reserve mineral rights in the right of way but to convey those rights to the Railroad Company.

However, it is claimed by the government herein that there was a change in governmental policy shortly before the passage of the act of March 3, 1875, supra, and that the new policy was against the granting of excessive rights to railroad companies. Assuming that there was a change of attitude or policy on the part of Congress, the use by Congress in the granting act of exactly the same language which had theretofore been used to grant a fee in the right of way would nevertheless conclusively imply an intent of Congress to grant the same rights theretofore granted by use of the same words notwithstanding the assumed change of policy. It is contended by the respondent, however, that the changed purpose of Congress resulted in the incorporation in the act of March 3, 1875, supra, of a sentence which it claims modifies the language of the granting clause of the statute and reduces the estate granted to a mere easement. This language is found in sub. 4 of the act which is quoted in full in the main opinion. The words relied upon to cause this change are: "And thereafter all such land over which such right of way shall pass shall be disposed of subject to such right of way." This phrase, my associates conclude, so limits the effect of the granting clause in section 1 of the Act as to grant no more than an easement in the right of way, reserving the fee for future disposition.

I am unable to ascribe such potent effect to the statement in §4 of the act that subsequent land grants "over which such right of way shall pass"

shall be subject to such right of way. It seems to me that this is a mere statement of the obvious priority attaching to prior grants. The qualifying phrase is made necessary in this general offer of a right of way, not because of a change of policy as to the nature of the estate granted but because it was necessary to indicate in some fashion how and when the rights of a railroad company accepting the grant should accrue. Where the act conveyed the land in praesenti it was unnecessary to indicate priorities, because the date of the act fixed the right of the grantee. This was the case of grants to specifically named railroad companies. Consequently, the general right of way of the act of March 3, 1875, supra, provided the manner in which the railroad company should accept the offer contained in the general granting act. I am confirmed in this view by several considerations.

In the first place, on February 5, 1875, Congress passed an act granting a right of way to the Oregon Central Pacific Railway Company containing the same clause "and thereafter all lands over which the line of said road shall pass shall be so located and disposed of by the United States subject to such right of way so located as aforesaid", but the grant is of "a strip of land 100 feet wide, on each side of the central line of said road, through the public lands, and the necessary lands for depots, stations, side tracks, and other needful uses in operating said road and telegraph, not exceeding twenty acres at any one place." The phrase "a strip of land", so

far as I am advised, has always been held to describe the land itself rather than an easement or right of way. We thus have Congress saying that other land grants of the fee shall be subject to such fee. This would indicate not that there was created a dominant and servient estate but that any subsequent grant by the United States whether describing the railroad right of way or not should be held to be subject to the prior grant to the railroad.

The second consideration which leads me to the conclusion that this particular phrase relied upon by plaintiff as diminishing the fee in the right of way to a mere easement does not do so is because I believe the phrase has an entirely different purpose. The railroad in most instances was located upon and across unsurveyed government land. Consequently, the location of the right of way with relation to subsequent government surveys was impossible of ascertainment and this uncertainty might result in a patent granting lands theretofore granted to the railroad or in adverse posesssory claims. The act provides that the railroad company desiring to secure the benefits of the act shall file the location of its railroad "if upon unsurveyed land within 12 months after the survey thereof by the United States", etc. It thus appears that both the railroad company and settlers along the line of the railroad are entitled to certain possessory rights which are not defined until after the government survey of the lands involved, which might be years later.

Another reason that leads me to this conclusion is based upon the decision of the Supreme Court in Jamestown and Northern Railroad Co. v. Jones, 177 U. S. 125. It was there held that the Railroad Company could acquire its right of way by the act of March 3, 1875, supra, by constructing its railway over and across public lands without filing of the profile of its railroad as required by §4 of that act. In reaching this conclusion the court held that the provisions of §4 applied to the securing of a right of way by the filing of the profile before the railroad was constructed. The Supreme Court adopted the conclusion of the Secretary of the Interior announced in Dakota Central Ry. Co. v. Downey, 8 Land Dec. 115, in which the Secretary held that §4 is "designed to provide a mode by which fixity of location can be secured to a grantee, in anticipation of that construction by which location is defined in the section making the grant, and which shall have the effect, before the construction of the road, which the terms of the grant limit to the 'central line of said road', which only means—without the fourth section—a CONSTRUCTED road." The court thus affirmed the ruling of the Interior Department that a right of way under the act of March 3, 1875 could be obtained in either of two ways, first, by actually constructing the road upon unsurveyed land, or, second, by filing a profile of the road provided by §4 in the case of surveyed land, or lands surveyed after the road was located. The court went further than the Interior Depart-

ment had done by holding that the construction of a railroad across surveyed as well as unsurveyed public lands operated as acceptance of the grant to the Railroad Company and perfected its title to the right of way.

It thus becomes apparent from the decision that the provision in §4 under discussion relates to priority of title as between the railroad and the possessory rights of homesteaders and others when the railroad's claim is based upon the filing of its profile map, and not to the quality or effect of the grant. If we assume, as the court decided, that the railroad company also may acquire the right to the right of way by constructing its line without filing a profile map, it is obvious that the proviso in §4 would not apply because that section relates only to priority in the case of conflicting claims resulting from filing a profile of the railroad. If the grant under §4 is qualified by the proviso and that under §1 is not, we would have two different types of estate granted by the same act for the same purpose. This incongruity does not arise if we construe the proviso as applying merely to priority in the case of rights accruing to the railroad company by filing a profile of its road, as I think it must be construed.

The case of Jamestown and Northern Railroad Co. v. Jones, supra, is discussed in two cases by the Supreme Court in which the phrase under consideration is discussed. Minneapolis, St. Paul and S. S. M. Ry. Co. v. Doughty, 208 U. S. 251, 257, 258; Stalker v. O. S. L., 225 U. S. 142, 150, 151,

supra. In both of these cases the phrase under discussion is held to deal with the question of prority.

It should be added that Jamestown and Northern Railroad Co. v. Jones, supra, dealt with the claims of a homesteader who had located along the line of the railway and secured a patent from the United States government on May 26, 1893, based upon rights accruing before the filing of a profile map but after the construction of the railroad, covering an entire quarter section without any reservation of the rights of the railroad company, evidently issued because of the ruling of the Secretary that the railroad company could not secure a right of way across surveyed public land by merely constructing its railroad above referred to. This, and other decisions, indicates that there are cases in which the department has intentionally issued subsequent patents covering a portion of the right of way.

Furthermore, it should be noted on this point that the United States land laws relating to the acquisition of land by individuals deal only with public land, that is, with that part of the national domain in the ownership of the government subject to sale or other disposal under the general land laws. The Supreme Court, in October 1875, shortly after the enactment of the act of March 3, 1875, held that a railroad grant did not apply to sections in an Indian Reservation because the absolute title thereto was not in the United States. Leavenworth, etc., R. R. Co. v. U. S., 92 U. S. 733. At the same time

it held that a similar grant in California did not cover lands wrongly claimed to be in a Mexican land grant, stating that the words "public lands" are used in our legislation to describe such lands as are subject to sale or other disposition under general laws. The declaration in §4 of the act of March 3, 1875, supra, clearly indicates that the right of way lands are no longer public lands and as such subject to disposal under the general land laws. The decisions cited herein dealing with controversies between mining claimants or homestead claimants and grantees of railroad rights of way are all consistent with the view that such rights of subsequent claimants could not accrue to land granted for a right of way and, consequently, that the owners of lands contiguous to the right of way, or mining claimants within the limits of the right of way could acquire no title to such lands because they were no longer public lands. For these reasons I think the sentence in the fourth section of the Act of March 3, 1875 does not affect the character of the right of way granted.

I turn to a consideration of other decisions affecting the question of the nature of the right of way grant. In Rio Grande Ry. v. Stringham, 239 U. S. 44, supra, a patent had been granted to a placer mining claim extending across the railroad right of way without excepting or mentioning the right of way. The contest initiated by the Railroad Company was therefore between the right of way claimed by

the company and a fee simple title claimed by the patentee of the placer mining claim. It is true that the court, in adjudicating the rights of the parties, might have awarded the surface to the Railroad Company and the sub-surface mining rights to the placer mining claimant if so advised but the courts did not do this. On the contrary, they defined the right of the Railroad Company as being a limited fee. The Supreme Court held that inasmuch as the lower court had defined the right of the Railroad Company in the exact language of the granting act it had been given all it was entitled to and it was unnecessary to more fully define the right. The definition by the court of the rights of the Railroad Company was in answer to a claim on the part of the Railroad Company that it was entitled to a title in fee simple. The court said its title was not a fee simple absolute but a limited fee and in effect held that the judgment granted them that right. So that the contest between the two claimants for the fee simple was resolved by holding that the Railroad Company held a limited fee with an implied condition of reverter and that it was not necessary to decide whether the reversion would be to the United States or to the placer mining claimant to whom the government had attempted to convey a fee simple absolute. The contest before the court required it to determine the nature of the railroad company's right. That determination, in my opinion, was not dictum. If it could be said that the Supreme Court

overlooked the qualifying phrase in §4 of the act above quoted it might weaken the authority of the decision but that matter was called to the attention of the court and referred to in the opinion, wherein it is said:

"What the act relied upon grants to a railroad company complying with its requirements is spoken of throughout the act as a 'right of way', and by way of qualifying future disposals of lands to which such right has attached, the act declares that 'all such lands over which such right of way shall pass shall be disposed of subject to such right of way.'"

In Choctaw, O. & G. R. R. Co. v. Mackey, 256 U. S. 531, 538, the Supreme Court had occasion again to give attention to the rights granted by a statute granting a right of way to a railroad company. The statute was the act of Congress of February 18, 1888, ch. 13, 25 Stats. 35, cited and quoted in the footnote to the opinion written by Mr. Justice Brandeis (p. 535). A reference to this statute will show that it is much more apt to define an easement than the act of March 3, 1875, which we are considering. The court in that case had occasion to determine whether or not an assessment for betterments could be made by the city on the railroad company's right of way and station grounds. After quoting from Rio Grande Ry. v. Stringham, supra, the court said: "In effect, the railroad is the absolute owner of the land."

It may have been unnecessary in that case to say more than that the right granted was subject to

assessment by the local authorities but the reason given for the conclusion in which the court defines the right granted is not dictum.

In Stepan v. Northern Pac. Ry. Co., 263 P. 425, the Supreme Court of Montana considered the nature of the right granted by Congress to a railroad company for right of way under the act of March 3, 1875. Subsequent to the location of the right of way a quartz lode or vein was discovered by third persons who sank a shaft on the right of way. After working upon the claim for three years the discoverers applied to the United States for a patent which was granted under the name of "Little Johnnie Lode", the exterior boundaries of which were wholly within the 100-foot strip on the east side of the railroad track. The plaintiffs abandoned work on the claim after obtaining patent and the shaft caved and became partially filled prior to 1921, when the railroad company shifted its tracks and filled the shaft. The mining claimants sued the railroad company for damages. We thus have a contest between two parties, one claiming under a mineral patent granting the fee simple absolute to the patentee, and the other under a grant to the railroad company of a right of way. The trial court found that the railroad company did not need to use that particular part of the right of way occupied by the shaft and that in shifting its tracks it could have avoided the shaft. Consequently, it held the railroad company was guilty of trespass by filling in the shaft and awarded the stipulated amount of

damages, $1,000. The Supreme Court of Montana found it necessary to determine the effect of the act of March 3, 1875, supra, granting a right of way to the railroad company through public lands, and reversed the decision. While it is true that the opinion of the state court, or any federal court other than the Supreme Court, is not binding upon this court, a decision by a state Supreme Court upon the meaning of a federal statute and the interpretation thereof by the Supreme Court are entitled to weighty consideration. Consequently, I quote from that decision wherein the court said:

"* * * while, as to the surface ground of their claim, at least, the plaintiffs [patentees of the mining claim] could have acquired no more than a reversionary interest which would become effective only in the event the railway company ceased to use the strip for the purposes for which it was granted." The plaintiffs contended, however, "that plaintiffs' patent granted an absolute fee to the surface ground on the claim, subject only to the right of way which gave to the railway company the right to use such ground 'to the exclusion of every one, providing the surface was used to facilitate the operations of, or was used for, railroad purposes.' * * *

"Having found that the use to which the surface ground of the Little Johnnie Lode was put was not a railroad purpose, and was not necessary to facilitate the operations of the railroad, the court

adopted the theory of plaintiffs, and entered the judgment appealed from.

"If the railroad company had been granted a mere easement over lands thereafter patented to an individual, such individual might acquire the right to use a portion of the right of way by showing that such portion was not used by, nor necessary for the use of, the railroad company.

"However, the grant is more than an easement; it is a base, qualified, or limited fee, and has the attributes of a fee, that is, perpetuity and exclusive use and possession, (Citing cases) and the grant itself is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and carries with it the right to possession in the grantee and the use of the full width of the right of way thus granted, and the railroad company is not limited to so much thereof as it occupies or what is actually necessary for the use for which the grant was made." (Citing cases.)

The court concluded that the plaintiffs "subsequently acquired patent could not pass title to the land and thereby they acquired no rights in the surface ground at least."

In Stalker v. Oregon Short Line R. R. Co., 225 U. S. 142, the Supreme Court had under consideration a patent purporting to grant a fee to lands already incorporated in an application for a railroad grant of station grounds under the act of March 3, 1875. The court, speaking of the patent issued to Reed, while the application of the railroad for its right of way and station grounds was still pending, said:

"The patent is not an adjudication concluding the paramount right of the company, but insofar as it included lands validly acquired theretofore, was in violation of law, and inoperative to pass title."

Joy v. St. Louis, 138 U. S. 1, 44: "Now, the term 'right of way' has a twofold signification. It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed. Obviously, in this paragraph, it is used in the latter sense."

As to whether or not a mere surface right is granted to the railroad company in its right of way, it should be said there are a number of other considerations militating against that idea. In the first place, it is hardly believable that the railroad company does not have a right to sink water wells upon the right of way for the purpose of producing water for use in its engines. It is stated by the appellant that thousands of such wells have been dug and no doubt this is true. Furthermore, the railroad company was given the right to take from adjoining public lands "material, earth, stone and timber, necessary for the construction of said railroad." (Sec. 1 of the act of March 3, 1875, supra.) This of course would include the right to extract gravel and stone for ballast, and earth to make fills, timber for bridges. Evidently Congress intended that no lesser right should be granted as to the right of way.

If we hold, as I think we must, that the railroad company would have a right to sink wells for water upon its right of way to be used to make steam in the locomotives operating upon the right of way, it is difficult to conclude that they could not also bore for oil for use in the locomotives for heat and in the machine and wheels for lubrication. In this regard the railroad company states in its brief: "It is common knowledge that the railroads have in fact exercised such rights from the beginning, and have also drilled thousands of wells for the removal of water from beneath the right of way. * * * Water is taken from wells on the right of way for operation and it would be difficult to define a grant in terms that would permit the company to take water but not to take oil for its operating purposes."

With reference to the rulings of the Interior Department I cannot see that they are persuasive as to the legal effect of the act of Congress. The Department was required to make some decisions concerning the granting of patents to land through which the right of way passed and to decide whether such land should be surveyed in squares or otherwise and whether a claimant of such land should pay the price per acre fixed by law for the whole subdivision or with a deduction of an allowance for land contained in the right of way, but it had no power or occasion to pass upon the meaning of the statutory grant of the right of way. Here, be it said, as late as 1930 the Secretary of the Interior,

in advocating the passage of the act authorizing the development of oil along railroad rights of way, stated in his report to Congress: "The courts have established as a general principle that a right of way is a limited fee on an implied condition of reverter in the case of a nonuser of the land for the purposes for which it was granted." Opinion of C. C. Moore, Commissioner of the U. S. Land Office, forwarded to Congress by Secretary of the Interior Ray Lyman Wilbur, House Reports No. 263, 71st Congress, 2nd Session. With this statement I fully agree, but I do not agree with the conclusion of the Commissioner also included in the Report that Congress had a right to authorize the exploitation of the oil underlying the right of way on behalf of the United States.

I conclude that the right granted the railroad company was more than a mere easement, that the grant was of the fee subject to the conditions implied by the nature of the grant namely, that it should be used by the grantee, or its successors for the purpose for which it was granted, that is, for railroad purposes, and that when no longer so used, or if not so used at all, the title thereto reverted to the government. Therefore, I am of opinion that at least so long as the oil developed from the right of way, or its equivalent, is used as fuel or lubricant to operate trains over the right of way, it is used for railroad purposes. I would modify the decree accordingly.

[Endorsed]: Opinion and Dissent. Filed May 8, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 9624

RAYMOND J. MacDONALD, etc.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

GREAT NORTHERN RAILWAY COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DECREE

Appeals from the District Court of the United States for the District of Montana.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Montana and was duly submitted.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order denying petition for intervention, and judgment of the said District Court in this cause be, and each hereby is affirmed.

[Endorsed]: Filed and entered May 8, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Mr. F. G. Dorety, counsel for the appellant Great Northern Railway Company, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including July 7, 1941; and in the event the petition for a writ of certiorari to be made by the said appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, May 22, 1941.

[Endorsed]: Filed May 22, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred fifty-seven (157) pages, numbered from and including 1 to and including 157, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant Great Northern Railway Company, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 29th day of May, 1941.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 149

GREAT NORTHERN RAILWAY COMPANY,
Petitioner, and Appellant below

vs.

UNITED STATES OF AMERICA,
Respondent, and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

F. G. DORETY,
175 E. 4th Street,
St. Paul, Minnesota,

WEIR, CLIFT & BENNETT,
Helena, Montana,
Attorneys for Petitioner.

May 28, 1941.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

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STATE STATUTES CITED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

GREAT NORTHERN RAILWAY COMPANY,
Petitioner, and Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent, and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This proceeding originated by suit in the District Court of the United States for the District of Montana, brought

by the United States to enjoin petitioner from drilling for oil upon a section of its right of way in Glacier County, Montana. The right of way in question was granted by the United States under the general Congressional right-of-way grant of March 3, 1875 (18 Stat. 482), and the only question involved is whether under such Congressional grant the Railway Company, grantee, is entitled to remove any oil which may underlie the right of way, either for sale or for use as fuel upon its locomotives. The District Court granted a motion by the United States for judgment on the pleadings, and issued the injunction as prayed for. This judgment was affirmed by the Circuit Court of Appeals of the Ninth Circuit, Judge Wilbur dissenting.

BASIS OF THIS COURT'S JURISDICTION.

The jurisdiction of the Supreme Court to review the judgment of the Circuit Court of Appeals by writ of certiorari is sustained by the United States Judicial Code, Section 240 (43 Stat. 938). Judgment of the Circuit Court of Appeals was entered on May 8, 1941. This petition will be filed on or before June 9, 1941. The issuance of mandate from the Circuit Court of Appeals has been stayed until July 7, 1941 (R. 157).

The jurisdiction of the District Court was based upon the fact that the United States was plaintiff, and upon United States Revised Statutes Sections 563 and 629 and amendments thereto, now being Section 41, Title 28, United States Code. Jurisdiction of the Circuit Court of Appeals was based upon Section 225, Title 28, United States Code, 26 Stat. 828, 36 Stat. 1133, 38 Stat. 803, 43 Stat. 813, 936.

FEDERAL QUESTION PRESENTED.

The specific Federal question presented by this petition is whether a railroad company, having obtained a right of way through the public lands under the Act of March 3, 1875, is entitled to remove any oil which may underlie such right of way, either (1) for sale or other general disposition, or (2) for use as fuel upon railroad locomotives operating over such right of way.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The reasons relied on for allowance of the writ are:

(1) That the Circuit Court of Appeals has decided an important question of Federal law in conflict with applicable decisions of this Court.

The question of Federal law is highly important, because several hundred thousand miles of right of way have been granted under the same granting act, or other acts containing the same granting words, and thousands of acres of such right of way lie in oil bearing or mineral bearing districts. It is probable that the oil and mineral values underlying such rights of way aggregate many millions of dollars, and it is clearly in the interest of the United States, as well as in the interest of the railroad grantees and patentees of adjoining lands holding reversionary rights in the rights of way, that officers of the United States Land Department and of the railroads and adjoining property owners, should know definitely whether the minerals underlying the rights of way remained in the United States or passed to the grantees of the right of way.

It is believed that the decision of the Circuit Court of Appeals is in conflict with a dozen applicable decisions of this Court, cited in the accompanying brief, and holding that the land within the right of way strip granted by this Act and by similar granting clauses in other acts, is granted to and held by the railway company in fee simple, conditioned only upon its continued use for railroad purposes. While none of these decisions involves the specific question of the right to drill for oil, they do declare that the right of way strips were granted in fee, and that the grantees had all of the rights of a fee owner, and this would necessarily include the right to remove underlying oil. For example, in *Rio Grande Western R. Co. v. Stringham,* 239 U. S. 44, 60 L. Ed. 136, 36 S. Ct. 5, there was involved a question whether the railway company could enjoin the removal of minerals underlying its right of way strip granted under the act of March 3, 1875, where the grant of a mineral patentee overlapped the right of way. The Court said:

> "The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, *and carries with it the incidents and remedies usually attending the fee.*" (Italics in this brief supplied by us, unless otherwise specified).

(2) That the decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the 7th Circuit in *Carter Oil Co. v. Welker,* 112 Fed. (2d) 299, decided November 6, 1939. The right

of way strip involved in the latter case was obtained by private deed, but it was granted "for railroad purposes" and the court held that the railway company had the right to drill for oil on its right of way. While the decision in the case at bar involved a Congressional grant instead of a private deed, both cases involve the specific question of the right of a railway company to drill for oil on its right of way and the two courts have reached directly opposite conclusions under the respective facts presented to them.

(3) If it should be held that the decision of the Circuit Court of Appeals is not in conflict with the decisions of this Court, above referred to, upon the ground that those decisions do not involve the specific question of the right to remove oil, then it is submitted that the writ should be granted upon the ground that the Circuit Court of Appeals has decided an important Federal question, which has not been but should be settled by this Court, and which arises in several circuits other than the Ninth Circuit, and that neither the officers of the Land Department nor of the grantees nor adjoining land owners can know definitely, without a decision of this Court, whether the oil and minerals underlying the rights of way passed from the Government to the grantees.

(4) In the ninety years which have elapsed since the granting clause used in the Act of 1875 was first enacted by Congress, the decisions of the District Court, and of the Circuit Court of Appeals in this case are the first decisions of any court, state or federal, in which it has been held that the estate granted in the railroad right of way was anything less than a fee simple ownership of the entire

corpus of the land, conditioned only upon its continued use for railroad purposes.

(5) The decision of the Circuit Court of Appeals that the estate granted by the Act of March 3, 1875, is only an easement, is in conflict with admissions in the Government's brief that the estate granted by identical granting clauses in earlier Congressional grants, was a fee. There is no sound reason for attributing diametrically opposite effects to the same identical words in the earlier and later acts, and the decision of the court, coupled with the contrary admissions of the Government, create confusion and uncertainty as to the effect of the granting clause in this and earlier grants.

(6) The decision of the Circuit Court of Appeals was not unanimous. There was a very able and well considered dissent by Judge Wilbur. It is submitted that his decision is better reasoned than the opinion of the majority, and that his dissent accords with, while the decision of the majority conflicts with, the applicable decisions of this Court, the weight of judicial authority, and the plain intention of Congress as manifested in several provisions of the statutory grants.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its equity docket No. 9624, Great Northern Railway Company, Appellant, vs. United States of America, Appellee, to the end that this cause may be reviewed and

determined by the Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this court may seem proper.

Respectfully submitted,

GREAT NORTHERN RAILWAY COMPANY,

By F. G. DORETY,

WEIR, CLIFT & BENNETT,

Attorneys for Petitioner.

Dated May 28, 1941.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

GREAT NORTHERN RAILWAY COMPANY,
Petitioner, and Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent; and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the District of Montana, has been officially reported in 32 F. Supp. 651.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, dated May 8, 1941, has not yet appeared in the published reports, and will be found on pages 120 to 157 in the record.

JURISDICTION.

The jurisdiction of the Supreme Court to review the judgment of the Circuit Court of Appeals by writ of certiorari is sustained by the United States Judicial Code, Section 240 (43 Stat. 938). Judgment of the Circuit Court of Appeals was entered on May 8, 1941. The petition herein will be filed on or before June 9, 1941. The issuance of mandate from the Circuit Court of Appeals has been stayed until July 7, 1941 (R. 157).

The jurisdiction of the District Court was based upon the fact that the United States was plaintiff, and upon United States Revised Statutes, Sections 563 and 629, and amendments thereto, now being Section 41, Title 28, United States Code. Jurisdiction of the Circuit Court of Appeals was based upon Section 225, Title 28, United States Code, 26 Stat. 828, 36 Stat. 1133, 38 Stat. 803, 43 Stat. 813, 936.

STATEMENT OF THE CASE.

The case was submitted to and decided by the District Court upon the Government's motion for judgment on the pleadings (R. 10).

The only allegations in the complaint which need be considered here are the allegations that the petitioner obtained certain described right of way by grant from the United States under the Act of March 3, 1875, that by reason of said grant, it asserts ownership of the oils and minerals underlying the same and threatens to use portions of such right of way for the purpose of drilling for and removing subsurface oil, and that no lease or permit has been issued

by the Government for such purpose (R. 3-6). The answer admits the above mentioned allegations, and alleges affirmatively that oil suitable for locomotive fuel exists under the said right of way and can be economically removed, and that the petitioner intends to and will, unless restrained by the court, drill three separate wells upon the right of way, the proceeds of No. 1 to be sold commercially, the proceeds of No. 2 to be refined and the residue used for locomotive fuel, and the proceeds from well No. 3 to be used in their entirety as fuel upon petitioner's locomotives (R. 8 and 9).

There was no allegation that the threatened drilling for oil by the petitioner would interfere in the slightest with its full and complete use of the right of way for railroad purposes.

There were no further pleadings, and the motion for judgment was based upon the complaint and answer above summarized.

The text of the Act of March 3, 1875, under which the grant in question was made, is set forth as Appendix A to this brief.

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in failing to hold that the term "right of way" as used in the Act of March 3, 1875, meant "strip of land", and that the grant was a grant of the land itself with all of the incidents of fee ownership, including the ownership of any underlying oil.

(2) The Circuit Court of Appeals erred in finding that it was not the purpose of Congress in passing the Act of March 3, 1875, to grant anything but surface rights, and that no ownership in oil or minerals underlying the right of way passed by the grant.

(3) The Circuit Court of Appeals erred in affirming the decision of the District Court and in failing to reverse that decision and to direct that the injunction prayed for in the complaint be denied.

(4) The Circuit Court of Appeals erred in failing to direct that the injunction prayed for in the complaint be denied, at least as to the removal by petitioner of oil for use upon railroad locomotives operated upon the right of way granted under the Act.

ARGUMENT.

The granting words of the Act of March 3, 1875, are: "the right of way through the public lands of the United States is hereby granted to any railroad company * * * to the extent of one hundred feet on each side of the central line of said road." The full text of the act appears in Appendix A.

The controlling question seems to be, what did the term "right of way" mean when used in railroad legislation during the period of the railroad grants? Was it the equivalent of the term "strip of land" or did it mean "easement" or was it susceptible to either or both interpretations?

During and prior to the period of the Congressional grants, "right of way", as used in legislative enactments invariably meant the strip of land owned in fee.

While it has become common in many states in the last half century to consider the estate of a railroad in its right of way, especially when obtained by condemnation, not as a fee but as including only such rights in land as are necessary for the construction and operation of the railroad, it appears from earlier statutes and judicial decisions that prior to and during the period of the Congressional grants, the idea that a railroad might be built upon an easement had hardly been thought of, and it was the almost universal practice to regard a railroad right of way as a fee simple estate.

A clause granting a "right of way through the public lands of the United States" was first enacted in the grants to Atlantic & Gulf Railroad Company, and the Mobile & Ohio Railroad Company, by Acts of March 3, 1849 (9 Stat. 771, 772), and the same or similar granting clauses were re-enacted in about a dozen other grants during the period from 1850 to 1875.[1]

During and prior to the period of these grants the idea that a railroad might be constructed upon an easement, or

[1] Atlantic and Gulf, and Mobile and Ohio, March 3, 1849, 9 Stat. 771, 772.
Illinois Central Grant, September 20, 1850, 9 Stat. 466.
Union Pacific Grant, July 1, 1862, 12 Stat. 489.
Amended Union Pacific Grant, July 2, 1864, 13 Stat. 356.
Northern Pacific Grant, July 2, 1864, 13 Stat. 365.
Placerville Grant, July 13, 1866, 14 Stat. 94.
Leavenworth City Grant, July 23, 1866, 14 Stat. 212.
California & Oregon R. R. Grant, July 25, 1866, 14 Stat. 239.
Atlantic & Pacific R. R. Grant, July 27, 1866, 14 Stat. 292.
Stockton R. R. Grant, March 3, 1871, 16 Stat. 573.
Green Bay and Lake Pepin R. R. Grant, March 3, 1871, 16 Stat. 588.
Portland, Dalles & Salt Lake R. R. Grant, April 12, 1872, 17 Stat. 52.
Central Pacific R. R. Grant, Feb. 5, 1875, 18 Stat. 306.

upon a mere surface ownership, or any ownership less than a fee, does not appear either in legislative acts or judicial decisions. It seems to have been assumed that the site for a railroad, like the site for a factory, farm or home, should normally be owned in fee simple. It appears that during and prior to the period of the grants, the term "railroad right of way" had only one accepted meaning in legislative enactments. It was never used during that period as designating an easement and was universally used as a brief means of describing the narrow strip of land owned by a railroad company in fee, and upon which the tracks were constructed.

Between 1827 and 1875 some 68 statutes or special acts were passed in 28 states or territories, permitting railroad companies to acquire the land itself or a fee simple estate in their rights of way. A large majority—47 acts in 13 states—declared specifically that the decree should vest in the company "the fee simple of the land" or that "the lands (or right of way) shall vest (or be vested) in the company in fee simple", or "shall vest the right of fee simple to the said strip or strips of land in the railway company".[1] Some included the word "absolutely" or "full and complete title",[2] and some used the word "forever".[3] Only three of them said "for public purposes" or limited the estate to the life of the corporation.[4]

Ten other statutes in nine states declared that the "real estate" or "land", or "title to the land" shall vest in the company. These statutes did not use the words "fee sim-

[1]See statutes listed in Note 1, Appendix B to this brief.
[2]See statutes listed in Note 2, Appendix B to this brief.
[3]See statutes listed in Note 3, Appendix B to this brief.
[4]See statutes listed in Note 4, Appendix B to this brief.

ple" but they vested in the company the land and not a mere right in or user of the land.[5]

Two statutes expressly required that the award should include not only the value of the "land", but of any "mineral deposits", or of stone, gravel, and "other materials" in the land, thus clearly indicating that title to minerals passed to the railroad company.[6]

Two statutes drew a distinction between a railroad and a turn-pike or highway, declaring that, in the case of the railroad "the title * * * shall be absolutely vested in fee simple", but that in the case of the turn-pike or highway, "the right of way only shall be so vested".[7] Some declared that upon entry of the decree, the former owner should be divested of or barred from all right or interest in the land taken.[8]

And in five states the law provided that the decree should have the same effect as a voluntary conveyance of the land.[9]

Two of these statutes were passed in 1827 and 1828; 22 between 1830 and 1840; 4 between 1840 and 1850; 13 between 1850 and 1860; 17 between 1860 and 1870; and 10 between 1870 and 1880, so that they covered the entire period of the Congressional grants and some 23 years prior thereto.

It must be concluded therefore that, so far as legislative usage throws any light upon the question, the term "right of way" when used in legislative enactments prior to 1875, invariably referred to the land itself and not the incor-

[5]See statutes listed in Note 5, Appendix B to this brief.
[6]See statutes listed in Note 6, Appendix B to this brief.
[7]See statutes listed in Note 7, Appendix B to this brief.
[8]See statutes listed in Note 8, Appendix B to this brief.
[9]See statutes listed in Note 9, Appendix B to this brief.

poreal right in the land, and invariably contemplated ownership in fee. The meaning of the term "right of way", as used in Congressional grants and as disclosed by other provisions of the grants themselves, will be discussed later.

Judicial decisions seem to support the same usage.

We have not been able to locate any decision during the period prior to 1849, when the first Congressional grant was enacted. But in 1852 the Supreme Court of Vermont, while holding that the railway company would not take a fee simple estate under the statutes of Vermont, pointed out that the New York courts took a different view because, "in the railroad charters of that state, it is provided that the company may take the fee of the land." *Quinby vs. Vermont Central R. R. Co.*, 23 Vt. 387 at 393. And in 1856 in *Blake vs. Rich*, 34 N. H. 282, it appears that, in New Hampshire, the railroad took only a lease of "the right to construct a railroad", but the court refers to "numerous cases in other states, where it has been holden that the fee in lands taken vests in the railroad."

In the libraries available to us, we have not been able to locate either the earlier New York decisions referred to in *Quinby vs. Vermont Central*, or the "numerous cases in other states" referred to in *Blake vs. Rich*, but the statements of the court in these two cases would indicate that there had been numerous earlier decisions supporting the fee simple estate, and they also indicate that there were no other decisions denying the fee, since none are referred to.

In 1854, in *Chicago & Miss. R. Co. v. Patchin*, 16 Ill. 198, the court indicated that the estate of the railroad was

an absolute ownership in fee, and similar statements were made in *Prather v. Western Union Tel. Co.*, 89 Ind. 501 (1883); *Yates v. Van De Bogert*, 56 N. Y. 526 (1874); *Buffalo Pipe Line Co. v. N. Y. L. G. & W. R. Co.*, 10 Abb. N. C. 107 (1882); *Ballard v. L. & N R. Co.*, 9 Ky. Law Reports 523, 5 S. W. 484 (1887).

The leading cases in support of the easement theory, which are cited in the opinion of the Circuit Court of Appeals (R. 124), were *Penn. S. Valley R. Co. vs. Reading Paper Mills*, 149 Pa. 18, 24 Atl. 205, decided in 1892; *Kansas City R. Co. v. Allen*, 22 Kan. 285, 31 Am. Repts. 190, decided in 1879; and *Smith v. Hall*, 103 Iowa 95, 72 N. W. 427, decided in 1897. In *Penn. S. Valley R. Co. v. Reading Paper Mills, supra*, the court referred to the surface ownership conception as a "newly invented interest in land". This was in 1892, forty-three years after the first Congressional grant, and seventeen years after the last one. The only cases that we know of prior to 1875, which do not support the fee simple view, are the two cases from New Hampshire and Vermont above referred to, and in those cases the courts seemed to imply that they stand alone and that all other known cases at that time supported the fee simple estate.

In the opinion of the Circuit Court of Appeals in this case (R. 125), the majority opinion says "It is claimed that the majority of the not very numerous state decisions upon this question, prior to 1875, upheld the view that a railroad has the fee in the land over which its right of way passes. We assume this to be true."

It must be concluded therefore that the invariable practice in legislative enactment, and that the almost invar-

iable practice in judicial statement, during and prior to the period of the Congressional grants, was to use the term "right of way" as meaning the land itself, and to imply fee ownership.

The provisions of the Congressional grants indicate that Congress itself used the term "right of way" in the sense of strip of land.

Several of the earlier acts expressly granted a "*strip of land* through the public lands" instead of a "right of way through the public lands." *Leavenworth City R. R. Grant*, 14 Stat. 212; *Green Bay and Lake Pepin Grant*, 16 Stat. 388; *Portland, Dalles & Salt Lake Grant*, 17 Stat. 52; *Central Pacific Grant*, 18 Stat. 306; *Hot Springs R. R. Grant*, 19 Stat. 108; *Western R. R. of Minn. Grant*, 21 Stat. 69.

There was nothing about any of the last mentioned railroads or any of the last mentioned grants to indicate that Congress intended to grant a different kind of estate to these railroads, and no reason appears why it should have done so. It seems clear that Congress used the terms "strip of land" and "right of way" as being interchangeable and synonymous, and that while the term "right of way" was generally used, the term "strip of land" was occasionally used as being synonymous.

And several of the grants in which the term "right of way" is used bear internal evidence that they were intended to create a fee estate. Five of the grants passed between 1850 and 1872 contained condemnation provisions permitting the railroads to appropriate private lands for

"right of way" and made it clear that the right of way so appropriated was to be held in fee. For example in Section 7, of the Northern Pacific Grant, 13 Stat. 365, the company was authorized "to enter upon, purchase, take and hold *any lands or premises* that may be necessary and proper for the construction and working of said road, not exceeding in width 200 feet on each side of the line of its railroad", etc. Upon payment, the company shall *"acquire full title to the same for the purposes aforesaid."* Payment shall "vest in said company the *title of said land* and the right to use and occupy the same." "The title of the company to the *lands taken"* shall not be impaired by neglect of any guardian. If any party shall have a leasehold or subordinate interest, "the value of any such estate, *less than a fee simple"*, shall be determined, etc. Where the land is unoccupied, the company may institute proceedings for the purpose of "ascertaining the value of, and of acquring *title* to the same." The full text of the appropriation provision in the Northern Pacific Grant, 13 Stat. 365, which is typical of all, is set forth in Appendix C of this brief.

In the Senate bill which was finally superseded by the Act of March 3, 1875, Section 9 contained provisions similar to those above quoted, and the debates in the Senate in 1874 and 1875 are replete with statements that the intent was to give the railroads an absolute fee simple title in the entire property. In the Congressional Record of the 43rd Congress, First Session, page 2899, Senator Wright said "that is to say, after they have paid the money, the *title becomes absolute* in the railroad company * * *. It vests in them the *absolute title of said land* and the

right to use and occupy the same for the construction, maintaining and operating of the road of said corporation, *not merely the right to use and occupy it for that purpose,* but it vests in them *title to the lands.*"

Senator Stewart said "They are to have it (the condemned private land) for the purpose of a right of way * * *. They have only the *right of way* and they take the *land* for this purpose * * * and then they shall have the *absolute title to it* * * *."

These appropriation provisions seem to indicate conclusively that during the period of the railroad grants, when Congress referred to a railroad right of way, it had in mind not an easement but the strip of land itself to be held in fee. The appropriation provisions above referred to, which were set forth in full in the Northern Pacific grant, were adopted in Section 3 of the Act of March 3, 1875, under which petitioner obtained its right of way.

The fact that the earlier grants in each case were made to the grantee and its "successors and assigns", that the grant of right of way was "through" the public lands and not "over" them, that there were provisions to extinguish the Indian title where the grants passed through Indian lands (see Sec. 8, 13 Stat. 365), and that the grants recite in each case that they are made for the "public advantage and welfare" and provide for free transportation of troops and munitions and give the Government the right of "preferred" transportation, all afford additional indications that Congress had no intention of reducing the granted estate to the minimum.

The term "right of way" to designate the strip of land itself is still universally used in statutes and railroad conveyances and is common in private deeds and such use is supported by dictionaries.

Statutes requiring fencing of the right of way strip, removing weeds therefrom, or providing for crossings for highways, canals, irrigation ditches, etc., seldom or never use the term "strip of land occupied by tracks" and invariably use the term "right of way", although they are of course referring to the land itself and not an easement. See, for example, Sections 6551, 6552 and 7110 of the Revised Codes of Montana, 1935. There are hundreds of similar statutes, all referring to the strip of land itself as a "right of way".

In some cases Congress itself, as well as state legislatures, has used both the term "strip of land" and the term "right of way" referring to the same land and in the same statute. 18 Stat. 396, granted to the Central Pacific Railroad Company "a *strip of land* 100 feet wide on each side of the center line of said road through the public lands", and in a later part of the act enacted "thereafter all lands over which the line of said road shall pass shall be sold, located, or disposed of by the United States, subject to such *right of way* so located as aforesaid". In Statutes of Indiana for 1863, page 33, Section 5, it is provided: "When any such corporation shall have procured the *right of way*, it shall be seized in *fee simple* of the *lands*."

From a very early time in railroad history it has been the universal practice in conveyances or mortgages of extensive railroad properties, to first make a general grant

of the line of railroad between two termini and then to enumerate the different items of component property in great particularity and detail. Main track, side track, second track and switches; grades, excavations, roadbed and tunnels; stations, shops, roundhouses, bridges, turntables; locomotives, passenger cars, freight cars, cabooses, hand cars; machines, tools, and equipment; telephone and telegraph poles and wires; all are enumerated in detail. In the case of lands, the same particularity is used. Station grounds, yard grounds, shop sites, etc., are specified by name. And when it comes to the most important property of all, the site or strip of land occupied by the main line tracks, the term universally employed has always been "right of way". In spite of the detail and particularity which has been considered desirable, it has never been considered necessary to mention the strip of land occupied by the road tracks, even though owned in fee simple, by any other terminology than "right of way".

Example of this may be found in Montana public records, Volume E, page 80; Volume 1 of Mortgages, page 3; Volume 10 of Mortgages, page 1; Book O of Deeds, pages 127, 220-317; Volume 3 of Railroad Deeds, Mortgages and Leases, page 148; Book 6 of Mortgages, pages 4, 39 and 110.

Where a strip of land deeded to a railroad has been designated as a right of way in a private deed, the courts have frequently regarded this as a grant of the land in fee.

Ballard v. L. & N. R. Co. (1887), 9 Ky. Law Reports 523, 5 S. W. 484.

Stevens v. Galveston R. Co. (Tex.), 212 S. W. 639.

Radetsky v. Jorgensen, 70 Colo. 423, 202 Pac. 175.

Arkansas Improvement Co. v. Kansas City Southern Ry., 189 La. 921, 181 So. 445.

Johnson v. Valdosta R. Co., 169 Ga. 559, 150 S. E. 845.

Midstate Oil Co. v. Ocean Shore R. Co., 93 Cal. App. 704, 270 Pac. 216.

Marland v. Gillespie, 168 Okla. 376, 33 Pac. (2d) 207.

Some of the dictionary definitions are as follows:

Webster's New International 1937: "The land other than storage or station yards occupied by a railroad for its tracks, especially for its main line; also the strip of land over which a public road is built."

Funk & Wagnall's 1932: "The strip of land acquired by a company * * * by easement, by condemnation, or by purchase for the use of its structures."

New Century 1927: "A path that may lawfully be used; specifically the strip of land traversed by a railroad."

The grant was not a gratuity and there would be no object in retaining the minerals in the government. The consideration far outweighed the value of the grant, which therefore requires a liberal construction.

A 200 foot right of way strip contains approximately 25 acres to the mile, and, at the going price of $1.25 per acre, the value of the fee simple title to the right of way was $32.50 per mile. The purpose of the grant was to permit or secure the construction of a railroad useful for national defense and for strengthening economic and political unity, which would require the investment of private funds of some $25,000 to $100,000 per mile.

When the earlier grants were made it was customary to increase the price of the adjoining lands remaining in the public domain from $1.25 per acre to $2.50 per acre. Ten miles of public land on each side of the railroad would contain 12,800 acres, and the increase in selling price in this strip would amount to $16,000 per mile.

A reduction of the estate granted from a fee to an easement would benefit no one, because it is conceded that the possession of the railroad is exclusive. If the railroad cannot remove minerals, no one else can. *Rio Grande Western R. R. v. Stringham*, 239 U. S. 44, 60 L. Ed. 136, 36 S. Ct. 5. Reducing the estate of the railroad would not benefit homesteaders on adjoining land, and there would be no object in reducing the estate to an easement. It would simply freeze the minerals in place.

The Northern Pacific grant in 1864 granted alternate sections for 20 miles on each side of the railroad, containing nearly 13,000 acres to the mile, or 500 times the right of way acreage. In these 13,000 acres Congress not only granted the fee, but specifically included coal and iron lands, and some of the grants included all minerals except gold and silver. In a statute displaying the rather lavish prodigality displayed in granting 13,000 acres in fee including minerals, it would be surprisingly inconsistent to find Congress thriftily reserving the fee and the minerals in the 25 acres of right of way and reducing the value of the grant from $32.50 per mile to some still smaller amount, especially where the reservation would benefit no one, because no one but the railroad could get at the minerals, and when the books indicate that up to that time no one had ever thought of giving a railroad anything but the fee

ownership of its right of way strip, and when the building of railroads on easements had not been thought of.

This Court has held that while gratuitous public grants, such as grants of adjacent sections, are to be strictly construed against the grantee and in favor of the sovereign, this rule does not apply to the right of way grants.

In *Great Northern Railway v. Steinke*, 261 U. S. 119, at 124, 67 L. Ed. 564, 43 S. Ct. 316, it was held that the purpose of the grant of 1875 was to enhance the value and hasten the settlement of the public lands and that because of this

> "the act has been regarded as requiring a *more liberal construction* than is accorded to private grants or to the extensive land grants formerly made to some of the railroads."

In *Nadeau v. Union Pacific R. Co.*, 253 U. S. 442, at 444, 64 L. Ed. 1002, 40 S. Ct. 570, the court said in regard to a right of way grant:

> "This provision is not to be regarded as bestowing bounty on the railroads; it stands upon a somewhat different footing from private grants and should receive liberal construction favorable to the purposes in view. United States v. D. & R. G. R. R., 150 U. S. 1, 8, 14."

The granting of a fee estate would not go beyond the purpose of the act.

Counsel argue that the purpose of the grant was merely to give a right of passage over the public lands; that an easement was all that was necessary to accomplish that purpose; that the minerals were not necessary to enable the

railroad to cross the public lands; and that no grant of the minerals was contemplated.

All this would generally be equally true in the case of most homestead patents and most deeds of farms or factory sites. In 99 deeds out of 100 all that the grantee really needs for the purposes of the deed is exclusive use of the surface. When land is transferred, it is seldom that the possibility of minerals is thought of or that there is any deliberate purpose or intent to convey or receive any minerals. And yet in 99 deeds out of 100 it is a fee title which is conveyed, and minerals, if there are any, go with it, not because the minerals were thought of, but because they are an incident of the fee. So that the fact that a grant of minerals was not thought of or contemplated, and that the mere right to use the surface would accomplish the purpose of the deed or grant, proves nothing.

And there is no foundation for the statement that the purpose or object of the grant was to convey a mere right of passage or any other particular form of estate—either an easement or a fee. The purpose of the grant was to get railroads built, by providing sites or locations for their construction across public lands. This purpose could be accomplished just as effectively and perhaps more effectively by granting a strip in fee than by an easement.

If it could be shown in some way that Congress had been seeking that form of grant which would give the absolute minimum estate to the railroads and still make it possible for the roads to be built, it might follow that they would have selected an easement. However, there is no evidence that Congress was seeking such a minimum estate. From 1850 to 1870 while they were making right of way grants,

they were also making lavish gifts of adjoining sections, including coal and iron lands. No disposition was shown to whittle down any part of the grant to the lowest possible minimum. The generous width of 200 feet, and 400 feet in the Northern Pacific grant, when 50 feet would have been sufficient at most points, proves this.

It was never the practice or policy of Congress to grant surface rights and reserve underlying minerals.

The Government claims that prior to 1875 it had become the policy of the Congress to reserve minerals underlying public lands. This is not true. It had become the policy to reserve mineral *lands* from ordinary patents. But mineral lands were never excepted from *right of way* grants, and in no case had Congress ever granted surface rights and severed and reserved the underlying minerals. The only purpose of reserving mineral lands was to make them available to mineral claimants, but there could be no such object as this in reserving minerals under the right of way, because mineral claimants could not enter the right of way to conduct mining operations.

Debates in House of Representatives did not refer to character of estate granted.

A Senate bill for which was substituted a House bill which later became the Act of March 3, 1875, contained elaborate provisions including one for Federal incorporation of railroad companies. During the debates in the House of Representatives when the Act of March 3, 1875,

was under consideration, a question was raised by some of the representatives as to whether the proposed act would deprive the states of jurisdiction over intrastate freight rates. One or two of the representatives pointed out in reply that the House bill, unlike the Senate bill, did not provide for Federal incorporation but simply granted a right of way and nothing more. In the arguments below counsel for the Government contended that this statement, that the act "granted a right of way and nothing more", meant that it granted an easement and no greater estate. The context however makes it clear that what the representatives meant to say was that the proposed bill granted a site for the railroad and nothing more—that is, no Federal incorporation.

The opinion of the Circuit Court of Appeals does not mention this argument and apparently the Court felt that it had no merit. We mention it here merely because the Government stressed it emphatically in the lower courts and may stress it again here. An examination of the context will make it clear that the debaters were not referring to the character of the estate granted and that this subject was not under consideration, but that they were pointing out merely that there was no provision in the act for Federal incorporation or any other provision which might deprive the states of jurisdiction.

In accordance with the foregoing considerations, 12 decisions of the Supreme Court and every decision ever rendered by a state or lower federal court construing the right of way grants, except the decision now at bar, have uniformly held over a period of more than 50 years that the estate granted by the federal grants was a fee title, conditioned only upon continued railroad operation.

In *Joy v. St. Louis*, 138 U. S. 1, 44, 34 L. Ed. 843, 11 S. Ct. 256, the Court said:

> "Now the term 'right of way' has a two-fold signification. It is sometimes used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that *strip of land* which railroad companies take upon which to construct their road-bed. *That is the land itself and not a right of passage over it.*"

In *New Mexico v. United States Trust Co.*, 172 U. S. 171, 43 L. Ed. 407, 19 S. Ct. 128, it is pointed out that where an intermittent non-continuous use is contemplated, it is reasonable to interpret a grant of right of way as a mere easement, but *where the use is to be continuous and embraces the entire beneficial occupation and use of the land, the presumption is in favor of a fee.*

In *Rio Grande Western R. Co. v. Stringham*, 239 U. S. 44, 60 L. Ed. 136, 36 S. Ct. 5, there was involved a question whether the railway company could enjoin the removal of minerals underlying its granted right of way strip, where the grant of a mineral patentee overlapped the right of way. The Court said:

"The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, *and carries with it the incidents and remedies usually attending the fee.*"

In *Northern Pacific Railway v. Townsend*, 190 U. S. 267, 47 L. Ed. 1044, 23 S. Ct. 671, the Court said:

"* * * The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad *just as though the land had been conveyed* in terms to have and to hold the same so long as it was used for the railroad right of way. In effect *the grant was a limited fee,* made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

In *M. K. & T. Ry. Co. v. Roberts*, 152 U. S. 114, 38 L. Ed. 377, 14 S. Ct. 496, the Court made the following statements:

Page 116:

"The United States had the right to authorize the construction of the road of the Missouri, Kansas & Texas Railway through the reservation of the Osage Indians and to grant absolutely *the fee of the two hundred feet* as a right of way to the company."

Page 117:

"That grant (of right of way) was absolute in terms, covering *both the fee* and the possession."

Page 122:

"* * * the grant of right of way under the Act of Congress of July 26, 1866, to the Missouri, Kansas & Texas Railway and the *title of the lands* composing that right of way had become vested in that company."

In *M. K. & T. Ry. Co. v. Oklahoma*, 271 U. S. 303 at 308, 70 L. Ed. 957, 46 S. Ct. 517, the Court said:

> "The company owned its *right of way lands* and station grounds *in fee.*"

In *Noble v. Oklahoma City*, 297 U. S. 481, at 494, 80 L. Ed. 816, 56 S. Ct. 562, the Court said:

> "Assuming, for the sake of argument, that the Act of 1888 granted the railroad a base or limited fee, *as does the General Railroad Act of March 3, 1875* * * *."

In *Clairmont v. United States*, 225 U. S. 551, at 556, 56 L. Ed. 1201, 32 S. Ct. 787, the Court said:

> "Thus, by the grant of Congress the railroad company obtained the fee *in the land* constituting the 'right of way'."

In *Buttz v. Northern Pacific Railway*, 119 U. S. 55 at 66, 30 L. Ed. 330, 7 S. Ct. 100, the Court said:

> "At the time the Act of July 2, 1864 (the Northern Pacific grant) was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the *fee of the land* to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant *conveyed the fee* subject to this right of occupancy."

In *Choctaw R. R. v. Mackey*, 256 U. S. 531, at 538, 65 L. Ed. 1076, 41 S. Ct. 582, the Court said:

> "The railroad's interest, as stated in Rio Grande Western v. Stringham, 239 U. S. 44, 47, is 'neither a mere easement, nor a fee simple absolute, but a limited

fee, made on an implied condition of reverter in the event that the company ceases to retain the land for the purposes for which it is granted, and carries with it the *incidents and remedies usually attending the fee*'. In effect the railroad is the absolute owner of the *land*. Its use is, and necessarily must be, exclusive."

In *Noble v. Union River Logging Railroad*, 147 U. S. 165, at 176, 37 L. Ed. 123, 13 S. Ct. 271, the Court said:

"The uniform rule of this court has been that such an act was a grant *in praesenti* of *lands* to be thereafter identified."

This language is quoted with approval in *Jamestown and Northern Railroad Company v. Jones*, 177 U. S. 125, at 130, 44 L. Ed. 698, 20 S. Ct. 568.

In *United States v. Michigan*, 190 U. S. 379, at Page 398, 47 L. Ed. 1103, 23 S. Ct. 742, the Court said:

"We have just held in *Northern Pacific Company v. Townsend*, *ante* p. 267, in reference to a grant of a right of way for the railroad, that it was 'in effect *a grant of a limited fee*, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.'"

In *Northern Pacific Ry. Co. v. Ely*, 197 U. S. 1 at page 6, 49 L. Ed. 639, 25 S. Ct. 302, the Court said:

"In effect *the grant was of a limited fee*, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

In *Stalker v. Oregon Short Line*, 225 U. S. 142, at 146, 56 L. Ed. 1027, 32 S. Ct. 636, the Court said, speaking of the Act of 1875:

> "The uniform construction of this act has been that it is a grant '*in praesenti* of *lands* to be thereafter identified.'"

State decisions construing the Congressional grants have been uniformly to the same effect.

State v. Northern Pacific Ry. Co., 88 Mont. 529, 295 Pac. 257.

Denver & S. L. R. R. v. Pacific Lbr. Co., 86 Colo. 86, 278 Pac. 1022.

Stepan v. Northern Pacific Ry., 81 Mont. 361, 263 Pac. 425.

Dugan v. Montoya, 24 N. M. 102, 173 Pac. 118.

Union Pacific R. R. v. Davenport, 102 Kan. 513, 170 Pac. 993.

Crandall v. Goss, 30 Ida. 661, 167 Pac. 1025.

Bowman v. McGoldrick Lbr. Co., 38 Ida. 30, 219 Pac. 1063.

Northern Pacific Ry. v. Myers-Parr Mill Co., 54 Wash. 447, 103 Pac. 453.

Wilkinson v. Northern Pacific Ry., 5 Mont. 538, 6 Pac. 349.

The Government admitted in its brief below that the clause granting "a right of way through the public lands", as repeatedly used for 25 years in earlier grants, granted a fee (and impliedly that the railroads which obtained their right of way under the earlier grants had the right to drill for oil), and gave no adequate reason for denying similar right to grantees under the Act of March 3, 1875.

After referring to the liberal land grant policy prevailing prior to 1875, the Government on page 8 of its brief below said: "With such a policy prevailing, it is not surprising to find that the courts have construed such grants as conveying to the railroads a fee in their right-of-way. After all, if Congress was willing to grant to the Northern Pacific the alternate sections in a belt of land 80 miles in width, it is difficult to gainsay that railroad's claim of a fee in the very lands on which its tracks are laid".

Judge Wilbur in his dissenting opinion (R. 138) said: "As stated in the main opinion the Government concedes that in many prior grants of rights of way to railroads, it was the intention of Congress to convey a fee 'limited only by the possibility of reverter'."

Only two possible reasons are given for applying a different construction to the same identical granting words in the Act of March 3, 1875. One is that in 1872 Congress passed a resolution declaring that subsidies in public lands should be discontinued and "the public lands should be held *for the purpose of securing homesteads to actual settlers* and for educational purposes, as may be provided by law".

It is obvious that the reduction of the estate in the right of way from a fee to an easement would not tend to se-

cure homesteads for actual settlers or accomplish any educational purpose. The fact that Congress abandoned the policy of granting alternate adjacent sections in the aid of construction, in order to preserve lands for homesteaders, affords no indication whatever that it intended to change the character of the estate in the right of way, especially when it continued to use the same identical granting clause which it had been using for the past 25 years in granting fee titles.

The only other reason for reversing the effect of the grant of a "right of way through the public lands" in the Act of March 3, 1875, is that Section 4 of the later act contained a provision permitting the railroad to obtain its right of way in advance of construction by filing of a location map, and provided that thereafter the lands over which such right of way shall pass should be disposed of subject to such right of way. The argument is that lands cannot be disposed of "subject" to a right of way, unless the right of way is a mere easement, and it is therefore urged that this provision in Section 4 for disposing of adjacent lands must be held to have qualified the grant in Section 1, in spite of the fact that Congress continued to use the identical granting words which had previously been used to grant a fee title.

One difficulty with this argument is that the provision for subsequent disposition of the lands over which the right of way shall pass did not originate with the Act of 1875, but first appeared in Section 2 of the *Portland, Dalles & Salt Lake Grant*, 17 Stat. 52, approved April 18, 1872. And it is significant that that Act granted not a right of way through the public lands but "a *strip of land* one

hundred feet wide on each side of the centre line of said road". Here it is a "strip of land" and not a "right of way" which was granted, and yet provision is made for disposing of the lands over which the line of road shall pass, "subject to such right of way so located". The Act of 1875 simply borrowed this language from the Act of 1872. It seems perfectly clear that the purpose in both acts was to provide for the preserving of the right of way strip after the filing of the map of location and for the disposition only of the balance of the subdivisions through which the map of location might run. This is pointed out so forcefully in Judge Wilbur's dissenting opinion below (R. 141-147), that we will not attempt to repeat or summarize his arguments, but respectfully refer the Court to that portion of Judge Wilbur's opinion commencing near the top of page 141 and continuing to page 147.

We submit that after Congress had used a grant of "the right of way through the public lands" for 25 years to convey a fee title, and if it had then decided to reverse its policy and reduce the estate to an easement, it would have been perfectly absurd for it to continue to use the same granting words and to expect that the farfetched inference from the language in Section 4 would be sufficient to make clear to the courts and the people, its intention to adopt a new form of estate for the right of way.

The prohibition against alienaton of the right of way does not apply to removal of oil.

In *Northern Pacific Ry. v. Townsend*, 190 U. S. 267, 47 L. Ed. 1044, 23 S. Ct. 671, and in *Great Northern Ry. Co.*

v. Steinke, 261 U. S. 119, 67 L. Ed. 564, 43 S. Ct. 316, it is held that a third party could not obtain title by adverse possession to any part of the right of way strip or station grounds covered by these right of way grants; that the whole of the granted right of way must be presumed to be necessary for the purposes of the railroad; and that nothing was granted for private use or disposal, nor beyond what Congress deemed reasonably essential, presently or prospectively, for the quasi public uses indicated.

The Government argues that under these decisions, since no part of the right of way can be *alienated* for private use, it follows that no part can be *used* even temporarily for private purposes, and that oil cannot be removed therefrom.

The prohibition against alienation arises from the condition subsequent which requires that the entire width of the right of way be used, or at least held available for use, for railroad purposes. If a portion of the surface were alienated, that portion would no longer be available for present or future public use and the grant thereof would fail.

This would not be true of any temporary occupation of a portion of the surface under revocable permit for private use. And the removal of oil would not affect the fullest possible use of the right of way for railroad purposes, either presently or prospectively, any more than would the removal of water from a well, and the complaint makes no allegations that there would be any such interference. It has frequently been held that use of the right of way for private purposes, either by the railway company or

under revocable permit to others, is not a breach of the condition.

Grand Trunk R. Co. v. Richardson, 91 U. S. 454 at 463, 23 L. Ed. 356;

Hartford Fire Ins. Co. v. Chicago, etc. Ry., 175 U. S. 91, 99, 44 L. Ed. 84, 20 S. Ct. 33, 36;

Sioux City v. Missouri Valley Pipe Line Co., 46 Fed. (2d) 819;

Northern Pacific R. Co. v. Northern American Telephone Co., 230 Fed. 347, 349;

Holland Co. v. Northern Pacific Ry. Co., 214 Fed. 920.

In *M. K. & T. Ry. v. Oklahoma,* 271 U. S. 303, 70 L. Ed. 957, 46 S. Ct. 517, it was held that the railway company was entitled to compensation where crossing rights were acquired by a city over granted right of way, and in *Northern Pacific R. Co. v. Meyers-Parr Mill Co.,* 54 Wash. 447, 103 Pac. 453, it was held that the railway company could recover the value of timber removed by a trespasser for private purposes from the granted right of way.

Even where private right of way deeds have been involved, the cases declaring the estate of the railroad to be a fee simple, outweigh those holding it to be an easement.

It is our opinion that the state court decisions involving private deeds should be given little consideration in view of the repeated interpretations by the Supreme Court of the United States of the Congressional grants themselves. However, the Government laid great stress below upon state court decisions holding that railroads have only an

easement in right of way obtained by condemnation or private deed, and the majority opinion below (R. 124) seems to concede considerable effect to these decisions.

In view of this we take the liberty of referring the court to the following decisions holding the estate granted to have been a fee. Cases on both sides are cited in a footnote to *Magnolia Petroleum Company v. Thompson*, 106 F. (2d) 207, at 227, and we submit that the following cases upholding the fee estate greatly outweigh those to the contrary.

Carter Oil Co. v. Welker, 112 Fed. (2d) 299;

Midstate Oil Co. v. Ocean Shore R. Co., 93 Cal. App. 704, 270 Pac. 216;

Radetsky v. Jorgensen, 70 Colo. 423, 202 Pac. 175;

Johnson v. Valdosta R. R., 169 Ga. 559, 150 S. E. 845;

Chicago and Mississippi R. R. v. Patchin, 16 Ill. 202;

Ballard v. L. & N. R. Co., 9 Ky. Law Reports 523, 5 S. W. 484;

Arkansas Improvement Co. v. Kans. City So. Ry., 189 La. 921, 181 So. 445;

Nelson v. Texas & Pacific R. R., 153 La. 117, 92 So. 754;

Dolby v. Dillman, 283 Mich. 609, 278 N. W. 694;

Luedeke v. C. & N. W., 120 Neb. 124, 231 N. W. 695;

Buffalo Pipe Line Co. v. N. Y. L. G. & W. R. Co., 10 Abb. N. C. (N. Y.) 107;

Quinn v Pere Marquette Ry., 256 Mich. 143, 239 N. W. 376;

Battele v. New Haven Ry., 211 Mass. 442, 97 N. E. 1004;

Marland v. Gillespie, 168 Okla. 376, 33 Pac. (2d) 207;

Sherman v. Sherman, 23 S. D. 486, 122 N. W. 439;
Stevens v. Galveston R. Co. (Tex.), 212 S. W. 639;
Messer v. Oestreich, 52 Wis. 684, 10 N. W. 6;
Keynerd v. Hulen, 5 Fed. (2d) 160 (cert. denied 269 U. S. 560, 70 L. Ed. 411, 46 S. Ct. 1);
Gilbert v. M. K. & T. R. R., 185 Fed. 102;
Supervisors, Warren County v. Patterson, 56 Ill. 111;
Tinker v. Forbes, 136 Ill. 221;
Downen v. Rayburn, 214 Ill. 342;
Concklin v. New York C. & H. R. R. Co. (1912), 149 App. Div. 739, 134 N. Y. Supp. 191 (appeal of which was dismissed in 207 N. Y. 752, 101 N. E. 1099);
Colgate v. New York C. & H. R. R. Co. (1906), 51 Misc. 503, 100 N. Y. Supp. 650;
Phillips Gas & Oil Co. v. Lingenfelter, 262 Pa. 500, 105 Atl. 888, 5 L. R. A. 1495;
Nesral Production Co. v. St. Louis, B. & M. Ry. Co. (Texas), 84 S. W. (2d) 805;
Cincinnati R. & Ft. W. R. Co. v. C. C. & St. L. R. Co. (Ind.), 123 N. E. 1;
Indianapolis P. & C. R. Co. v. Rayl, 69 Ind. 424;
Carr v. Miller (1921), 105 Nebr. 623, 181 N. W. 557;
Switzer v. Chaffee County, 70 Colo. 563, 203 Pac. 680;
Clevenger v. Chicago, M. & St. P. R. Co. (1919) (Mo.), 210 S. W. 867;
Ft. Worth & D. C. Ry. Co. v. Ayers (Tex.), 149 S. W. 1068.

Subsequent rulings of the Land Department and acts of Congress supporting the easement theory are self-serving declarations, and are in conflict with Supreme Court decisions, with the intent of the grants and with admissions by the government in this case.

It appears from the opinion below (R. 130-134) that the Circuit Court of Appeals relied largely upon rulings of the Land Department and Acts of Congress, long after the period of the grants, indicating a view that the estate granted to the railroads in their right of way was an easement and not a fee.

The Land Department rulings are somewhat conflicting. The first of them was issued nearly 40 years after the first right of way grant and 13 years after the last one. The acts of Congress which the court refers to are still later. While technically admissible, these rulings are self-serving declarations, and were made so long after the grants that they lose their persuasive force.

The views expressed are contrary to the uniform holdings of this court that the estate granted was not an easement but a determinable fee. They ignore and were apparently made in ignorance of the fact that a railroad right of way was invariably regarded as a fee estate, both in legislative enactments and judicial statements during and prior to the period of the grants.

These rulings applied to the earlier grants as well as the Act of 1875 and, as to the earlier grants, they are contrary to the admissions made below in this case by the Government and above referred to, to the effect that the estate granted by the earlier acts was not an easement but a fee.

The owner of a conditional fee estate is entitled to the underlying oil and minerals.

This proposition has not been disputed by the Government nor by the lower court. It is well settled that the owner of a base or limited fee, until the determination of his estate, has all of the rights of a fee simple owner and has as complete dominion over the land for all purposes as though he held it in fee simple.

21 C. J. 923;

10 R. C. L. 652, 653;

Washburn on Real Property, 6th Ed., Sec. 168;

First Universalist Soc. v. Boland, 29 N. E. 524, 155 Mass. 171;

Hillis v. Dils, 100 N. E. 1047, 53 Ind. App. 576;

Fox v. Van Fleet, 170 S. W. 185, 160 Ky. 796, 799;

Landers v. Landers, 151 S. W. 386, 151 Ky. 206;

Matthews v. Hudson, 7 S. E. 286, 81 Ga. 120;

Des Moines R. Co. v. Des Moines, 159 N. W. 450.

Accordingly railroad companies are accorded the right to drill for oil on right of way held in fee.

40 *Corpus Juris* 962;

51 *Corpus Juris* 573, Sec. 237;

Montana Mining Co. v. St. Louis Mining Co., 204 U. S. 204, 217, 51 L. Ed. 444, 27 S. Ct. 254;

Nelson v. T. & P. R. Co., 92 So. 754, 152 La. 117;

Crowell v. Howard, (Tex.), 200 S. W. 911;

Quinn v. Pere Marquette R. Co., 239 N. W. 376, 256 Mich. 143;

Brightwell v. Intl. Grt. N. R. Co., 49 S. W. (2d) 437, 121 Tex. 338;

Kynerd v. Hulen, 5 Fed. (2d) 160 (C. C. A. 5th Circuit);

Atty. General v. Pere Marquette R. Co., 248 N. W. 860, 262 Mich. 431;

Gilbert et al. v. M. K. & T. Ry., 185 Fed. 102;

Rice v. Clear Spring Coal Co., 186 Pa. St. 64, 40 Atl. 149;

Stephenson v. St. L. S. W. R. Co., 181 S. W. 568;

Stevens v. Galveston H. & S. A. R. Co., 212 S. W. 639;

Carter Oil Company v. Welker, 112 Fed. (2d) 299.

Where land has been deeded for school purposes, the grantee cannot be enjoined from removing oil underlying the land. *Dees v. Chauvronts* (Ill.), 88 N. E. 1011, 240 Ill. 486. Also *Priddy v. School District,* 92 Okla. 254, 256, 219 Pac. 141.

A grant even though not in fee and limited to railroad purposes only would include the right to use materials or fuel within the bounds of the grant, and the injunction should be denied as to removal of oil for railroad fuel.

Even if our grant be limited to a right of use for railroad purposes only, this would include the right to use any materials or fuel found within the bounds of the grant, and the injunction should be denied, at least as to the removal of oil for railroad fuel. It is now uniformly conceded, even by courts leaning to the easement theory, that the estate of the railroad is more than a bare common law easement or incorporeal right. It is conceded that the railroad has the right to exclude the servient owner and to

maintain exclusive possession, and that it has the right to excavate cuts and dig tunnels below the surface, to take materials from one part of the right of way for enbankments in other parts, and to dig wells for water. There is no basis in the wording of the grant for drawing a line and permitting some of these railroad uses and denying others. Even under the more restrictive decisions, the railroad should have the right, not only to take exclusive possession of the surface, but also to use timber on the surface, and materials, water or fuel below the surface, so long as they are found within the 200 foot strip, and so long as they are used for railroad purposes only. We submit that, even though it should be held that our estate is not a fee and that we therefore have no right to use any part of the right of way for any non-railroad use, it should still be held that we have the right to use oil underlying the right of way for railroad fuel, and to this extent the opinion of the court below should be reversed and the injunction denied.

We respectfully urge therefore that a writ of certiorari be issued to review the decision of the Circuit Court of Appeals and to correct the manifest error therein.

Respectfully submitted,

F. G. DORETY,

WEIR, CLIFT & BENNETT,

Attorneys for Petitioner, Great Northern Railway Company,

175 East Fourth Street,

St. Paul, Minnesota.

May 28, 1941.

APPENDIX A.

Act of March 3, 1875, 18 Stat. 482.

"Chap. 152. An act granting to railroads the right-of-way through the public lands of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Sec. 2. That any railroad company whose right of way, or whose track or roadbed upon such right-of-way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right

of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: Provided, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

Sec. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

Sec. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed

lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

Sec. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress theretofore passed.

Sec. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved, March 3, 1875."

APPENDIX B.

Early Statutes Indicating Ownership in Fee of Lands Embraced in Railroad Rights of Way.

Note (1) Laws of California, 1850-1853, Ch. LXXV, Sec. 28, p. 267.

Revised Statutes of Colorado, 1868, Ch. XVIII, p. 132.

Laws of Dakota Territory, 1864, Ch. LXVII, Sec. 7, p. 152.

Laws of Dakota Territory (Special and Private) 1866-1867, Ch. IV, Sec. 6, p. 92, Id., Ch. V, Sec. 7, p. 101.

Laws of Georgia to 1837 (Prince's Digest) p. 301, par. 13; p. 316, par. 81; p. 320, par. 96; p. 324, par. 121; p. 336, par. 170; p. 340, par. 186; p. 342, par. 193; p. 349, par. 226; p. 363, par. 296; p. 368, par. 312; p. 376, par. 358.

Statutes of Indiana, Supp., Pub. 1862, Vol. I, Ch. 128.

Statutes of Indiana, 1863, p. 33, Sec. 3.

Statutes of Kansas Ty., 1855, Ch. 85, p. 911, Sec. 10; Ch. 86, p. 917, Sec. 9; Ch. 87, p. 923, Sec. 10; Ch. 88, p. 929, Sec. 10.

Laws of Kansas, 1864, Ch. 124, p. 326.

Laws of Missouri, 1853, p. 355, Sec. 1, 7, 9.

Revised Statutes of North Carolina, 1837, p. 340, par. 14; p. 293, par. 7; p. 410, par. 9; p. 401, par. 35; p. 363, par. 18.

Revised Code of North Carolina, 1855, Ch. 61, p. 358, par. 20.

Statutes of South Carolina, 1840, Vol. VIII, par. X, p. 359, par. X, p. 400; par. XXXV, p. 415; par. X, p. 425; par. X, p. 444; par. XIV, p. 466; par. X, p. 476.

Laws of South Carolina, 1839-1849, par. XVI, p. 404; par. XIV, p. 376; par. XVI, p. 389.

Laws of Texas, 1855-1861, Special Laws of the 7th Legislature, (1858) Ch. 51, p. 61 (1239), Sec. 10.

Code of Virginia, 1860, Title 17, Ch. 56, p. 325, par. 11.

Code of Virginia, 1873, p. 538, par. 11.

Code of West Virginia, 1870, ch. 41, p. 264, par. 18.

Revised Statutes of West Virginia, 1879, Ch. 79, Sec. 19.

Laws of Wyoming, 1869, Ch. 8, Sec. 45, p. 251.

Note (2) Code of West Virginia, 1870, Ch. 41, p. 264, par. 18.

Revised Statutes of West Virginia, 1879, Ch. 79, Sec. 19.

Laws of Virginia, Mathews Digest, 1856, Vol. I, p. 426, Sec. 11.

Laws of Texas, 1855-1861, Spec. Laws of the Fifth Legislature, (1853) Ch. V, p. 11, Sec. 10.

Laws of Georgia to 1837, (Prince's Digest) p. 320, par. 96.

Note (3) Laws of Georgia to 1837, (Prince's Digest) p. 376, par. 358.

Note (4) Comp. Laws Michigan, 1871, Ch. 75, Sec. 23, p. 758.

Swan's Rev. Statutes of Ohio, 1854 (Derby's Digest) Ch. 29, p. 235, Sec. XI.

Statute Law of New York (Diossy Edition, Vol. 3, p. 96, par. 22 (Laws of 1875, Ch. 606).

Note (5) General Laws of California, 1850-1864 (Hittell), Vol. I, p. 135, Sec. 860.
Laws of Illinois, 1852, p. 151, Sec. 15.
Compiled Laws of Nevada (1863-1873) Vol. II, p. 300, Sec. 3460.
General Laws of Oregon, 1843-1872, Title III, Sec. 47.
Statutes of Tennessee, 1858-1871, Ch. LIV, p. 48, par. 8; p. 49, par. 5.
Laws of Texas, 1855-1861, Spec. Laws of the 5th Legislature, (1853) Ch. V, p. 11, Sec. 10.
Compiled Laws, Utah, 1876, p. 213, Sec. 31.
General Stats. of Vermont, 1863, Title XIV, Ch. 28, p. 219.
Real Property Statutes, Washington Ty., 1843-1889, p. 336, Sec. 12.

Note (6) Rev. Code of Alabama, 1867, Sec. 1411.
General Laws, New Mexico, 1882, (Act of 1878) p. 457.

Note (7) Rev. Stats. of West Virginia, 1879, Ch. 79, Sec. 19.
Code of West Virginia, 1870, Ch. 41, p. 264, par. 18.
Code of Virginia, 1873, p. 538, par. 11.

Note (8) Compiled Laws of Michigan, 1857, Ch. 67, Sec. 23, p. 643.
Compiled Laws of Michigan, 1871, Ch. 75, Sec. 23, p. 758.

Rev. Stats. of New York, 1859, Vol. II, Banks & Bro. 5th Ed., p. 675, Sec. 18.

Stat. Law of New York, Diossy Ed., Vol. 3, (p. 96, par. 22) Laws of 1875, Ch. 606.

Note (9) Laws of California, 1850-1853, Ch. LXXV, Sec. 28, p. 267.

Digest of the Stats. of Louisiana, 1870, Vol. I, p. 346, par. 25.

Maryland Code Supp. 1870, Art. 26, p. 40.

Rev. Stats. of North Carolina, 1837, p. 305, par. 20.

Laws of Virginia, Tates Digest, 1841, p. 766, par. 11.

APPENDIX C.

Appropriation Provisions of the Northern Pacific Grant, 13 Stat. 365.

"Sec. 7. And be it further enacted, That the said "Northern Pacific Railroad Company" be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width two hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and

working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed, upon application by either party, to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and in case the party appealing does not obtain a verdict, increasing or diminishing, as the case may be, the award of the commissioners,

such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, of a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and of the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by any infant, femme covert, non compos, insane person, or persons residing without the territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may in-

stitute proceedings, in manner described for the purpose of ascertaining the value of, and of acquiring title to, the same; but the judge of the court hearing said suit shall determine the kind of notice to be served on such owner or owners, and he may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred."

No. 149

In the Supreme Court of the United States

OCTOBER TERM, 1941

GREAT NORTHERN RAILWAY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

The Government does not oppose the granting of the petition for a writ of certiorari in this case.

The question involved is whether a railroad company has any right, title, or interest in the minerals underlying those portions of its right-of-way acquired under section 1 of the Railroad Right-of-Way Act of March 3, 1875, c. 152, 18 Stat. 482, 43 U. S. C. sec. 934.

The court below held that this Act conferred on the railroads rights in the nature of an easement and not a strip of land in fee, choosing to follow the language of the statute, and its administrative and legislative construction, rather than the dictum

of this Court in *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44 (R. 133).

While the decision below is not in conflict with the adjudications of this Court nor with the decisions of other circuits, it does raise an important federal question which has not been but which should be settled by this Court (cf. Pet. 3–5). Thousands of miles of railroad rights-of-way in the public land states have been acquired by the railroads under the 1875 Act, and the question whether that grant included subsurface minerals is important not only to the railroads and the Government but to many subsequent patentees of lands crossed by these rights-of-way. Even though the decision below seems clearly correct, it will not constitute a definitive interpretation of the 1875 grant so long as this Court's dictum in the *Stringham* case is allowed to stand, nor will it be controlling in other circuits and in the state courts where the same questions will inevitably arise.

For the foregoing reasons the issuance of a writ of certiorari in the present case is not opposed.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 60–76) is reported in 32 F. Supp. 651. The opinions of the Circuit Court of Appeals (R. 120–155) are reported in 119 F. (2d) 821.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 8, 1941 (R. 156). The petition for a writ of certiorari was filed on June 9, 1941, and granted on October 13, 1941 (R. 159). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a railroad company has any right, title, or interest in the minerals underlying those portions of its right of way acquired under Section 1 of the Act of March 3, 1875, c. 152, 18 Stat. 482, 43 U. S. C. sec. 934.

STATUTES INVOLVED

The Right of Way Act of March 3, 1875, c. 152, 18 Stat. 482, 43 U. S. C. secs. 934–939, is printed as an appendix, pp. 39–41, *infra*. The provisions of other statutes, as far as relevant, are set out in the argument.

STATEMENT

This is a suit instituted by the United States on March 23, 1939, to enjoin the Great Northern Railway Company[1] from drilling for or removing gas, oil, and other minerals underlying those portions of its right-of-way acquired under Section 1 of the Act of March 3, 1875, c. 152, 18 Stat. 482 (R. 2–7).

The facts alleged by the United States (R. 3–7) and admitted by the Railroad (R. 7–8) are as follows: The Great Northern Railway Company is a railroad corporation, organized under the laws of Minnesota (R. 3). In 1907 the Railroad acquired from the St. Paul, Minneapolis and Manitoba Railway all of the latter's property, including rights-of-way which it had been granted under the

[1] Hereinafter sometimes referred to as the Railroad.

Act of March 3, 1875 (R. 3–4). The complaint further alleged that under the Act of March 3, 1875, the Railroad acquired neither the right to use any portion of the right-of-way for the purpose of drilling for and removing subsurface oil and minerals, nor any right, title, or interest in or to the deposits underlying the right-of-way, but that the oils and minerals remained the property of the United States (R. 4–5); and that although no lease had been issued to the Railroad under the Act of May 21, 1930 (46 Stat. 373), the Railroad claimed ownership of the oils and minerals underlying its right-of-way, and threatened to use the right-of-way to drill for and remove subsurface oil (R. 5).

In its answer the Railroad admitted the allegations of fact, claimed ownership of the subsurface minerals, and affirmatively stated that it proposed to drill three separate oil wells (R. 7–10).[2] The oil from well number one was to be sold commercially; the oil from number two was to be refined, the more volatile portions to be sold and the residue used on its locomotives; and the oil from number three was to be used in its entirety by the Railroad as fuel oil (R. 9).

[2] In 1937 the Railroad had requested the Department of the Interior for an opinion in respect of its rights in the minerals underlying its right of way. That Department concluded that under the granting Act of March 3, 1875, the Railroad acquired "neither the right to use any portion of its right of way for the purpose of drilling for and removing subsurface oil nor any title or interest in or to such oil," 56 I. D. 206, 214 (1937).

On June 2, 1939, the United States filed a motion for judgment on the pleadings (R. 10).

The District Court on April 25, 1940, rendered an opinion holding that the 1875 Act did not convey the minerals to the Railroad (R. 60–76). On July 25, 1940, the court entered a final judgment enjoining the Great Northern Railway Company from drilling for or removing the oil, gas, and other minerals underlying its right of way (R. 99–101).

On appeal by the Railroad (R. 101), the court below, with Judge Wilbur dissenting, affirmed the judgment of the district court (R. 156).

SUMMARY OF ARGUMENT

I

A. An examination of the language of the 1875 Act shows that only an easement was granted. Section 1 refers to "the" right of way; Section 2 refers to "use and occupancy"; and Section 4 requires the location of each right of way to be noted on the plats in the local land office, and provides that "thereafter all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way."[1] As the court below remarked (R. 129), "Apter words to indicate the intent to convey an easement would be difficult to find." Since "nothing passes but what is conveyed in clear and explicit language—

[1] Italics are ours throughout this brief.

inferences being resolved not against but for the Government," it seems patent that the 1875 Act did not convey to the railroads the underlying minerals for fuel or other purposes. *Caldwell* v. *United States,* 250 U. S. 14, 20–21.

B. That the 1875 Act granted to the railroads an easement rather than a fee is further confirmed by the legislative background and history of the Act. The policy of granting land subsidies to the railroads was discontinued in 1871. "Land Grants," 9 Encyclopedia of the Social Sciences (1933), p. 35. Thereafter, the grants were restricted to a mere right of passage across the public domain, a right which could be acquired in no other way while large blocks of lands were held by a sovereign immune from suit. This shift in policy was formally crystallized by congressional resolution in 1872. House Resolution of March 11, 1872, Cong. Globe, 42d Cong., 2d sess., 1585. And the debates preceding the enactment of the 1875 Act show clearly that the grant in the Act was consonant with the new policy of strict limitation and of granting easements rather than fees. Cf. 3 Cong. Rec. pt. 1, p. 407 (1875).

C. Both the subsequent administrative and legislative construction of the 1875 Act reinforce the conclusion that only an easement was granted.

1. Until this Court uttered a contrary dictum in *Rio Grande Ry.* v. *Stringham,* 239 U. S. 44 (1915), the administrative officers of the Govern-

ment consistently construed the 1875 Act as granting an easement rather than a fee. For example, the first general right of way circular of January 13, 1888 (12 L. D. 423, 428) expressly declared that "the Act of March 3, 1875, is not in the nature of a grant of lands; *it does not convey an estate in fee* * * * It is a *right of use* only, the *title* still remaining in the United States." Essentially similar statements are to be found in the railroad right of way regulations of March 21, 1892 (14 L. D. 338, 342), November 4, 1898 (27 L. D. 663, 664), February 11, 1904 (32 L. D. 481, 482–483), and May 21, 1909 (37 L. D. 787, 788). The contemporaneous decisions of the Land Department likewise refer to the 1875 grant as a "mere easement" (19 L. D. 588, 590), as "an incorporeal hereditament, an easement and not the land" (20 L. D. 131, 132), as "in the nature of a mere easement" (32 L. D. 33, 34). And, as this Court has said on more than one occasion, "the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous." *United States* v. *Johnston,* 124 U. S. 236, 253; *United States* v. *Moore,* 95 U. S. 760, 763; *Brewster* v. *Gage,* 280 U. S. 327, 336.

2. Congress, too, has construed the 1875 Act as granting an easement rather than a fee. For

example, the Acts of June 26, 1906, c. 3550, 34 Stat. 482, and February 25, 1909, c. 191, 35 Stat. 647, declaring a forfeiture of unused rights of way, state that the lands covered thereby shall be "freed and discharged from *such easement.*" Such clear-cut legislative pronouncements on the meaning of the 1875 Act are aids to the construction of that Act. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309; *United States* v. *Freeman*, 3 How. 556, 564–565; *McFadden* v. *Mountain View Min. & Mill. Co.*, 97 Fed. 670, 677 (C. C. A. 9, 1899); *Northern Pacific Railway* v. *Soderberg*, 188 U. S. 526, 533–534.

D. Because of the distinctive language in the 1875 Act, and also because of the sharp change in congressional policy in 1871, cases construing grants made prior to 1871 as vesting a fee in the railroads are without force. These important differences between the 1875 Act and the earlier land grant acts were not called to this Court's attention in *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44 (1915), a case in which the Government and private owners were not represented. Hence, the statement there made, by way of dictum, that the railroads have a "limited fee" in rights of way acquired under the 1875 Act should be reexamined. A repudiation of that dictum by a decision holding that the 1875 Act grants the railroads an easement rather than a fee will not disturb land titles; it will merely restore a rule of property which existed between 1875 and 1915, the period

during which most of these rights of way were acquired.

II

But even if it be determined that the Railroad has a "limited fee" in its right of way, it does not necessarily follow that such a "fee" includes the right to extract oil and other minerals. The purposes of Congress are accomplished if the grant is held to be a "fee" in the surface and so much of the subsurface as is necessary for support—a "fee" for a railroad thoroughfare exclusively. Cf. *Western Union Tel. Co.* v. *Pennsylvania R. R.*, 195 U. S. 540, 570. Since such an interest would accomplish the purposes of Congress, this is the largest interest which the applicable rules of construction will permit to pass under the Act. *Caldwell* v. *United States*, 250 U. S. 14, 20–21. Under such a construction the railroad is restricted in the use of the land except as a railroad thoroughfare. The right to use and extract minerals is a use of the land not permitted to the railroad. Cf. *Union Missionary Baptist Church* v. *Fyke*, 179 Okla. 102; *Jordan* v. *Goldman*, 1 Okla. 406, 453.

ARGUMENT

I

THE RIGHT OF WAY GRANTED BY THE ACT OF MARCH 3, 1875, IS IN THE NATURE OF AN EASEMENT

Introduction.—The present suit was instituted by the Government in order to obtain a determi-

nation of the nature and scope of the grant made by the Act of March 3, 1875. Until recently, the question whether the 1875 Act conveyed an absolute fee, a limited fee, or simply a surface easement was not of great practical consequence, since under any of the theories the Railroad's control of the surface was complete, and only the surface rights were of importance. But with the recent discovery of oil in Glacier County, Montana, close to the Railroad's right of way, the more precise nature and scope of the 1875 grant has become a matter of considerable importance not only to the Great Northern and other railroads with similar grants, but also to the Government and other owners of land adjacent to the railroad rights of way.

To resolve the question, the Railroad, in 1937, requested the Department of the Interior for an opinion respecting its rights to the minerals underlying its right of way. The Department concluded that the Act of March 3, 1875, conveyed no right to use the right of way in order to drill and remove subsurface oil and title or interest in such oil. 56 I. D. 206, 214 (1937). The Railroad, however, declared its intention to commence drilling operations notwithstanding the decision (R. 5), and reasserted its claim and intention in its answer to the Government's complaint (R. 9). With the Government's allegations of fact admitted by the Railroad (R. 7–10), the motion for judgment on the pleadings (R. 10)

thus presented the single question of law whether the Right of Way Act of March 3, 1875, granted to the Railroad the subsurface minerals.[4]

A. *The language of the 1875 Act shows that only an easement was granted.*—Section 1 of the Act does not grant "a" right of way. It grants "the" right of way through the public lands of the United States. This language, while not conclusive, would seem to indicate that Congress intended to grant the incorporeal "right" to lay tracks across the public domain and not a corporeal "strip of land." That Congress was granting the railroads the right to use and occupy the public lands, and not the lands themselves, is further evidenced by the language of Section 2, which declares that any railroad whose right of

[4] Many legal subdivisions crossed by railroad rights of way have since been patented to homesteaders, stock-raisers, and miners. This fact suggests an additional question whether these subsequent patentees have not thereby succeeded to the mineral rights of the Government in the lands thus patented. But inasmuch as the United States still owns thousands of acres of unpatented land along the Great Northern and other railroad rights of way, it is in a position to litigate the scope of the 1875 Act without raising at this time the legal effect of particular patents in specific cases (R. 134–136). It may be said in passing that the solution to the question whether the Government's mineral rights in particular parcels have passed to individual patentees will depend on the language of the statute under which the patent was issued, on the classification of the land at the time the patent was issued, and on the nature of the interest which this Court ultimately decides was granted to the railroads under the 1875 Act.

way passes through a canyon, pass, or defile, "shall not prevent any other railroad company from the *use and occupancy* of the said canyon, pass, or defile, for the purposes of its road, *in common* with the road first located." In other words, the Act confers a right of "use and occupancy" which in some instances must be shared "in common" with other railroads.

Finally, and significantly, Section 4 requires the location of each right of way to be noted on the plats in the local land office, and "thereafter all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way." To construe the right of way grant as a fee in the land would be to rob this provision of all meaning. It surely would have been novel, as well as wholly unnecessary, for Congress, after it granted a fee, to declare that the adjacent lands are to be conveyed "subject to" the prior grant in fee. As the court below pointed out, apter words to indicate an intent to convey an easement would be difficult to find (R. 129).

That this was, in fact, the precise intent of Section 4 is clear. Congressman Slater, in discussing the reason why the Public Lands Committee had inserted a similar clause in a special right of way bill under consideration in 1872, said:

> Mr. SLATER. The point [of this clause] is simply this: the land over which this right of way passes is to be sold subject to the right of way. It simply provides that

this right of way *shall be an incumbrance upon the land for one hundred feet* upon each side of the line of the road; that those who may afterward make locations for settlement shall not interfere with this right of way.

Mr. SPEER of Pennsylvania. It grants no land to any railroad company?

Mr. SLATER. No, sir.[5]

The 1875 Act becomes a harmonious whole if Section 1 be construed as conferring on the railroads an easement; to construe it as granting a fee would be to deprive this provision of Section 4 of all meaningful content.

Even were the words of the Act of 1875 less clear, it is well settled that any ambiguity in a grant is to be resolved in favor of the sovereign grantor.[6] This rule is applicable to the 1875 Act. *Caldwell* v. *United States*, 250 U. S. 14, 20–21; *United States* v. *Minidoka & S. W. R. Co.*, 190 Fed. 491, 494 (C. C. A. 9, 1911). In the *Caldwell* case, the appellants contended that the 1875 grant of timber for railroad construction included the refuse or tie slash from felled trees. In rejecting that interpretation, this Court said (pp. 20–21):

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[5] Cong. Globe, 42d Cong., 2d Sess., 2137 (1872).

[6] *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, 326; *Sioux City &c. Railroad* v. *United States*, 159 U. S. 349, 360; *Wisconsin Central R'd* v. *United States*, 164 U. S. 190, 202; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 545–546.

> The contention of appellants encounters the rule that statutes granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that such grants must be construed favorably to the Government and that *nothing passes but what is conveyed in clear and explicit language*—inferences being resolved not against but for the Government. *Wisconsin Central R. R. Co.* v. *United States*, 164 U. S. 190; *United States* v. *Oregon & California R. R. Co.*, 164 U. S. 526. * * *
>
> The rule, it seems to us, is particularly applicable. There was a grant of timber by the Act of March 3, 1875, not of trees, but of timber for purposes of railroad construction, *not as a means of business or of profit;* nor could it be made an element, as contended, of compensation to the agents employed to cut it.

If the timber grant in the 1875 Act does not include tie slash, there seems to be no reason why the right of way grant should be construed to include subsurface minerals. The rule of "liberal construction" for which petitioner contends (Pet. 23–25) is applicable only when necessary to carry out the *purposes* of the Act. Cf. *United States* v. *Denver &c. Railway*, 150 U. S. 1, 14; *Nadeau* v. *Union Pacific R. R. Co.*, 253 U. S. 442, 444. Plainly, in an act designed to permit railroads to lay their tracks across the public lands of the United States, it is not necessary to construe a right of way grant as

including fuel oil for railroad locomotives (cf. Pet. 43–44).[7]

Nor can it be argued that railroads, in order to operate efficiently, must have a fee in their rights of way. Petitioner conceded in its brief in the court below (p. 61) that railroads, when they condemn land for rights of way, "do not acquire mineral rights or full fee ownership." If the railroads do not need a fee in those portions of their rights of way acquired by eminent domain proceedings, and the courts have so held,[8] the need for a fee in those portions of their right of way acquired under the 1875 Act is no more compelling. Hence, it scarcely can be said that the *purpose* of the 1875 grant will be frustrated if it be construed as conveying an easement rather than a fee. This will merely give to the grant the same meaning which is commonly given to deeds conveying a right of way for railroad purposes.[8a]

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[7] Cf Circular Instructions of August 29, 1885, 4 L. D. 150, 151, stating that "no public timber is permitted to be taken or used [under the 1875 Act] for *fuel* by any railroad company." And, of course, Congress could hardly have intended in 1875 to give oil to the railroads since oil as locomotive fuel was then unknown.

[8] E. g. *Quick* v. *Taylor*, 113 Ind. 540, 542 (1887); *Railroad Co.* v. *Schmuck*, 69 Kan. 272, 276–277 (1904); *Keown* v. *Brandon*, 206 Ky. 93 (1924); *Hall* v. *Boston & Maine Railroad*, 211 Mass. 174, 176 (1912); *Roberts* v. *Sioux City & P. R. Co.*, 73 Nebr. 8, 14 (1905); *Washington Cemetery* v. *P. P. & C. I. R. R. Co.*, 68 N. Y. 591 (1877).

[8a] The weight of authority supports the view that railroads acquire only an easement and not a fee where the granting clause of the deed declares the purpose of the grant to be a right of way for a railroad. See *Magnolia Petroleum*

B. *The legislative background and history of the 1875 Act show that the grant was of an easement rather than a fee.*—

1. The year 1871 marks the end of one era and the beginning of a new in American land-grant history. In that year the policy of lavish grants of land to encourage railroad construction was replaced by a new policy of severe restriction of federal munificence in respect of railroads. It is in the light of this shift that the Act of 1875 must be read, for it is well recognized that railroad grants "are to receive such a construction as will carry out the intent of Congress," and to ascertain that intent courts "must look to the condition of the country when the acts were passed." *Winona & St. Peter R. R. Co.* v. *Barney,* 113 U. S. 618, 625; *United States* v. *Denver &c. Railway,* 150 U. S. 1, 14; *Minidoka & S. W. R. Co.* v. *Weymouth,* 19 Idaho 234 (1911). "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed." *United States* v. *Union Pacific R. R. Co.,* 91 U. S. 72, 79; *Smith* v. *Townsend,* 148 U. S. 490, 494.

That there was a marked change in land-grant policy in 1871 is not open to dispute. The first important grant of public lands for railroad purposes was made to the Illinois Central in 1850.[9] During the next two decades "there passed into the hands

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Co. v. *Thompson,* 106 F. (2d) 217, 227 (C. C. A. 8), and cases there cited, reversed on other grounds 309 U. S. 478.

[9] Act of September 20, 1850, c. 61, 9 Stat. 466.

of western railroad promoters and builders a total of 158,293,000 acres, an area equaling that of the New England states, New York, and Pennsylvania combined."[10] The largest of these grants (40,000,000 acres) was made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365. That Act, in addition to providing a 400-foot right of way from Lake Superior to Puget Sound, also granted the alternate odd-numbered sections of public lands for 40 miles on each side of the railroad, with indemnity provisions for lands already sold, homesteaded, pre-empted, or otherwise disposed of. It is thus apparent that Congress in 1864 was willing to grant lands in "almost any amount"[11] to encourage the construction of transcontinental railroads. Faced with such an open-handed congressional policy, the courts have construed such early grants as conveying to the railroads a fee in their rights of way."[12]

But there was soon a public reaction against such legislative beneficence. In the late '60's land reformers began to condemn land grants "as inconsistent with the free homestead idea."[13] The abuses accompanying the lavish land grant policy

[10] "Land Grants," 9 Encyclopaedia of the Social Sciences (1933), p. 35.

[11] Statement by Representative Thaddeus Stevens during the debates on the Northern Pacific Bill, Cong. Globe, 38th Cong., 1st sess., 1698 (1864).

[12] *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267, 271. See *infra*, pp. 30–31.

[13] "Land Grants to Railways," 3 Dictionary of American History (1940), p. 237.

of the two previous decades finally became "so numerous and so apparent that land grants as a form of subsidizing internal improvements ceased with 1871."[14] The public sentiment promptly found congressional expression in the following Resolution adopted by the House of Representatives on March 11, 1872:

> *Resolved,* That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.[15]

Although unwilling after 1871 to make outright grants of land to private railroad companies, Congress did not wish to paralyze the development of an integrated system of railroads. And since the Government had not yet disposed of vast areas of land in the West, paralysis of development would have resulted had Congress refused to permit the railroads to lay their tracks across

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[14] "Land Grants," 9 Encyclopaedia of the Social Sciences (1933), p. 35; see also Bogart, *Economic History of the United States* (3d ed., 1918), p. 351.

[15] Cong. Globe, 42d Cong., 2d Sess., 1585 (1872). Cf. H. Rep. No. 10, 43d Cong., 2d Sess. (1874), p. 1 (Ser. No. 1656): "The Committee on the Public Lands, having considered the bill (H. R. 2732) to grant lands to aid in the construction of a railroad in the State of Alabama, are of opinion that *new*

the public lands of the United States.[16] To meet this situation the Forty-second and Forty-third Congresses (1871–1875) passed a number of special acts granting to designated railroads simply "the right of way" through the public lands of the United States.[17] And finally in 1875, in order to avoid the need for special legislation for each new railroad, Congress enacted the General Right of Way Statute involved in the instant case. The one purpose of that Act was to grant to the railroads a right of passage across the public domain, a right which could be acquired in no other way while large blocks of land were held by a sovereign immune from suit.

2. The debates preceding the enactment of the 1875 Act establish that the congressional intention, previously formulated, was to confer upon the rail-

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grants of land for building railroads ought not to be made, and therefore beg leave to report back the bill with the recommendation that it do not pass" (the bill reported on did not pass). That a similar policy prevailed in the Senate during this period is evident from the following statement by Senator Stewart during the debate on the Great Salt Lake and Colorado Railroad right-of-way bill (Cong. Globe, 42d Cong., 2d Sess., 4162 (1872)): "We were formerly in the habit of granting lands to aid in the building of railroads in the States and Territories. We have abandoned that policy." See also Cong. Globe, 42d Cong., 2d Sess., 2543 (1872); 3 Cong. Rec., pt. 1, 404 (1875).

[16] Cf. Cong. Globe, 42d Cong., 2d sess., 1591 (1872).

[17] Act of April 12, 1872, c. 96, 17 Stat. 52; Act of May 23, 1872, c. 205, 17 Stat. 159; Act of May 27, 1872, c. 220, 17 Stat. 162, 163; Act of June 1, 1872, c. 258, 17 Stat. 202; Act of June 1, 1872, c. 261, 17 Stat. 212; Act of June 4, 1872, c. 293, 17 Stat. 224; Act of June 7, 1872, c. 323, 17 Stat.

roads a mere right of passage rather than a strip of land. The statement by Mr. Hawley of Illinois is typical:

> It *simply and only* gives the right of way. It merely grants to such railroad companies as may be chartered the *right* to lay their tracks and run their trains *over* the public lands; it does nothing more.[18]

The Railroad contends (Pet. 27–28) that the force of these statements is weakened since, it is said, the character of the estate granted was not under discussion; and the statements were directed simply to assurances that the Act did not also grant a federal franchise or charter.[19] But it is significant that the same observations were repeatedly made during the debates on the special right-of-way statutes enacted between 1872 and 1875, in which the question of federal charters was wholly absent. For example, in reporting a bill granting a right-of-way to the Dakota Grand

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280; Act of June 8, 1872, c. 354, 17 Stat. 339; Act of June 8, 1872, c. 359, 17 Stat. 340; Act of June 8, 1872, c. 364, 17 Stat. 343; Act of June 10, 1872, c. 437, 17 Stat. 393: Act of March 3, 1873, c. 291; 17 Stat. 612; Act of June 20, 1874, c. 348, 18 Stat. 130; Act of June 23, 1874, c. 473, 18 Stat. 274; Act of February 5, 1875, c. 35, 18 Stat. 306.

[18] 3 Cong. Rec., pt. 1, p. 407 (1875). See also the statements of Mr. Hoar (pp. 404, 406).

[19] But cf. 2 Cong. Rec., pt. 3, p. 2898 (1874), where Senator Stewart, in commenting on the Senate version which included a franchise provision, stated that the "bill grants the right of way *simply*." And compare the statement of Mr. Hoar opposing the proposal to give the states power to

Trunk Railway Company,[20] the committee chairman said: "This is merely a grant of the right of way."[21] Likewise, in reporting a right-of-way bill for the New Mexico and Gulf Railway Company,[22] Mr. Townsend of Pennsylvania (the same Congressman who sponsored the Right of Way Act of March 3, 1875) observed: "It is nothing but a grant of the right of way."[23] Such statements, coupled with Mr. Slater's declaration (*supra*, pp. 11–12) of the purpose of the "subject to" clause, warrant the conclusion that Congress intended to grant the railroads an easement rather than a fee.

C. *Subsequent administrative and congressional construction confirm that only an easement was granted.*—

1. It is an established rule that "the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not

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regulate railroad rates. Mr. Hoar insisted that the proposal was invalid since "if the right of way were granted over the public land the title to which belongs to the United States and is vested in the United States, *so that the title consists in the ownership by the United States of the soil, and the use of it by the corporation*, it is very doubtful whether the State has authority, if disposed, to require changes in the rates" (3 Cong. Rec., pt. 1, p. 404 (1875)).

[20] Act of June 1, 1872, c. 258, 17 Stat. 202.

[21] Cong. Globe, 42d Cong., 2d Sess. 3913 (1872).

[22] Act of June 8, 1872, c. 364, 17 Stat. 343.

[23] Cong. Globe, 42d Cong., 2d Sess. 4134 (1872). For other similar statements, see Cong. Globe, 42d Cong., 2d Sess. 2138, 2543 (1872).

be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous." *United States* v. *Johnston* 124 U. S. 236, 253; *United States* v. *Moore,* 95 U. S. 760, 763; *Brewster* v. *Gage,* 280 U. S. 327, 336. Departmental circulars and regulations are especially persuasive. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315; *Swendig* v. *Washington Co.,* 265 U. S. 322, 331; *McFadden* v. *Mountain View Min. & Mill. Co.,* 97 Fed. 670, 677 (C. C. A. 9); *Taggart* v. *Great Northern Ry. Co.,* 208 Fed. 455, 460 (E. D. Wash. 1912), affirmed 211 Fed. 288 (C. C. A. 9).[24]

The earliest and most nearly contemporaneous administrative construction of the 1875 Act confirms that the Railroad was granted an easement rather than a fee. The first general right of way circular of January 13, 1888, stated (12 L. D. 423, 428):

> The act of March 3, 1875, is not in the nature of a grant of lands; *it does not convey an estate in fee,* either in the "right of way" or the grounds selected for depot pur-

[24] Petitioner suggests (Pet. 41) that the administrative interpretations are irrelevant since they follow the Act of 1875 by at least 13 years. But the rule relating to the weight to be given to administrative construction is not dependent on strict contemporaneity. Cf. *Swendig* v. *Washington Co., supra,* where the statute preceded the administrative construction by 11 years.

> poses. It is a *right of use* only, the *title* still remaining in the United States. * * *
>
> All persons settling on public lands to which a railroad right of way has attached, take the same *subject to* such right of way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases.[25]

These same provisions are repeated in the right of way regulations of March 21, 1892, 14 L. D. 338, 342. The next revisions of November 4, 1898 (27 L. D. 663, 664), and of February 11, 1904 (32 L. D. 481, 82) disclose slight changes in phraseology but the basic thought is the same.[26] In the departmental regulations of May 21, 1909, appeared perhaps the clearest of statements relating to the interests acquired under the 1875 Act (37 L. D. 787, 788):

> 1. *Nature of grant.*—A railroad company to which a right of way is granted *does not secure a full and complete* title to the land on which the right of way is located. It obtains only the *right to use* the land for the purposes for which it is granted and for no

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[25] Cf. Circular of June 27, 1900, 30 L. D. 325, 327, which uses similar language in describing the canal and reservoir rights of way granted by the Act of March 3, 1891, c. 561, sec. 18, 26 Stat. 1101.

[26] The changes in phraseology, especially those in the 1904 regulations, seem directly traceable to language used by this Court in describing a *land grant* right-of-way. *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267 (1903). Cf. *Melder* v. *White*, 28 L. D. 412 (1899), which also defined the Northern Pacific right-of-way as a base or qualified fee.

> other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the *fee simple title* in the land over which the right of way is granted to the person to whom patent issues for the legal subdivision on which the right of way is located, and *such patentee takes the fee,* subject only to the railroad company's right of use and possession. All persons settling on a tract of public land, to part of which right of way has attached, take the same subject to such right of way, and at the total area of the subdivision entered, there being no authority to make deduction in such cases. * * *

And the departmental regulations thus construing the Act of 1875 are further confirmed by decisions of the Land Department in which the 1875 grant has been construed as a "mere easement," as "an incorporeal heriditament, an easement and not the land," as "in the nature of a mere easement," as "merely an easement," and similar phrases.[27]

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[27] 19 L. D. 588, 590 (1894); 20 L. D. 131, 132 (1895); 32 L. D. 33, 34 (1903); 35 L. D. 495 (1907); 44 L. D. 552, 556 (1916). Patents issued to settlers on lands crossed by railroad rights-of-way have consistently included the entire legal subdivision, generally with a notation that it was issued "subject to" the right-of-way. See 4 L. D. 523, 524 (1884); 8 L. D. 115, 120 (1889); 19 L. D. 386, 388 (1894); 20 L. D. 131 (1895); 23 L. D. 67 (1896); 26 L. D. 77 (1898); 27 L. D. 430 (1898); 29 L. D. 478 (1900); 32 L. D. 33 (1903); 46 L. D. 429 (1918). Similarly it has been held that the railroads do not acquire a fee in, but only the use of, 20

It is plain, then, that the 1875 Act was contemporaneously construed by the Department of the Interior in its right of way circulars and its decisions as merely granting to the railroads a right to "use and occupy" the land for railroad purposes, with the fee remaining in the United States or its subsequent grantees. These are the regulations and the decisions which were in force when the Great Northern Railway Company and other non-land-grant railroads in the West acquired their rights of way across the public lands of the United States.

It is true that this uniformity of interpretation was broken in 1915 on the heels of the decision in

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acres for their station grounds. 4 L. D. 523 (1884); 4 L. D. 525 (1886); 32 L. D. 311 (1903); 35 L. D. 495 (1907); cf. Circular Instructions of March 9, 1878, 5 Copp's Land-Owner 35, 36 (1878), requiring proper affidavits to be filed before a company "may obtain the use" of grounds for station purposes; see also Circular Instructions of November 7, 1879, 6 Copp's Land-Owner 141, 144–148, 155 (1879). Petitioner's suggestion (Pet. 41) that the administrative construction loses force because of a supposed failure to discriminate between the grant of the Act of 1875 and similar granting acts, on the one hand, and the pre-1871 acts on the other, is not justified. Thus, for example, in 28 L. D. 412 (1899), Assistant Attorney General Van Devanter described the Northern Pacific (1864) right-of-way as "a base or qualified fee," but at the same time recognized that the special Act of July 4, 1884, c. 179 (23 Stat. 73), granted "only an easement." And in 32 L. D. 33, 34 (1902), he likewise observed that it was "well established that the right of way through the public lands granted to railroads" under the 1875 and similar acts was "in the nature of a mere easement."

Rio Grande Ry. v. *Stringham*, 239 U. S. 44.[28] But this administrative construction after 1915 cannot be deemed binding upon the Department of Interior since it was impelled by the apparent (although, we urge, erroneous) compulsions of the *Stringham* case. *Hartley* v. *Commissioner*, 295 U. S. 216, 220; *Helvering* v. *Hallock*, 309 U. S. 106, 121. And in any event, earlier decisions, being more nearly contemporaneous with the 1875 statute and evidencing a long-continued and uniform construction until 1915, are a more reliable index of the legislative intent and are accordingly more persuasive.[29] *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.

2. This Court has frequently recognized that "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.*,

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[28] Compare 14 L. D. 105 (1892), 35 L. D. 495 (1907), and 45 L. D. 473 (1916) with 51 L. D. 27, 305 (1925), 51 L. D. 131 (1925), 51 L. D 604 (1926), 53 I. D. 270 (1931), and 53 I. D. 339, 340 (1931).

[29] It should also be noted that, at least indirectly, the earlier administrative construction received congressional approval and adoption. By the Act of March 3, 1891, c. 561 (26 Stat. 1101), Congress granted canal and reservoir companies rights of way across the public domain, and in doing so repeated the language of the 1875 Act. And by the Act of March 6, 1896, c. 42 (29 Stat. 44), Congress made the 1875 Act partially applicable to the Colville Indian Reservation. These statutes are, in effect, legislative reenactments of the 1875 Act, and as such may be said to constitute adoption

221 U. S. 286, 309; *Cope* v. *Cope*, 137 U. S. 682, 687. "* * * if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman*, 3 How. 556, 564–565. Or, as the Ninth Circuit has tersely put it, "the legislative construction of its own act is always potent." *McFadden* v. *Mountain View Min. & Mill. Co.*, 97 Fed. 670, 677.

An examination of subsequent legislation plainly reveals that Congress has construed the 1875 Act as granting an easement rather than a fee. For example, the Act of June 26, 1906, c. 3550, 34 Stat. 482, declaring a forfeiture of unused rights of way, provides:

> *Be it enacted* * * * That each and every grant of right of way and station grounds heretofore made to any railroad corporation under the [1875] Act * * * where such railroad has not been constructed

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of the intervening administrative construction. See *National Lead Co.* v. *United States*, 252 U. S. 140, 146; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492–493; *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273. The situation is not substantially different from that presented in the *National Lead* case, *supra*, in which this Court held that congressional extension of the usual tariff drawback provision to another commodity constituted implied legislative approval of the administrative interpretation of the drawback provisions then in force in respect of other articles.

> and the period of five years next following the location of said road, or any section thereof, has now expired, shall be, and hereby is, declared forfeited to the United States, to the extent of any portion of such located line now remaining unconstructed, and the United States hereby resumes the full title to the lands covered thereby *freed and discharged from such easement*, and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land heretofore conveyed by the United States subject to any such grant of right of way or station grounds * * *.[30]

On this same day Congress enacted another statute confirming the rights of way which certain railroads had acquired under the 1875 Act in the Territories of Oklahoma and Arizona. Act of June 26, 1906, c. 3548, 34 Stat. 481. The committee reports, explaining the purpose of this legislation, contain the following pertinent description of the 1875 Act:

> The right as originally conferred and as proposed to be protected by this bill simply grants *an easement or use* for railroad purposes. Under the present law wherever the railroad passes through a tract of public land the entire tract is patented to the settler or entryman, *subject only to this easement.*

[30] The same language is repeated in the forfeiture Act of February 25, 1909, c. 191, 35 Stat. 647.

> The present bill does not in any way enlarge the nature of the right conferred.[21]

And finally the Act of May 21, 1930, c. 307, 46 Stat. 373, 30 U. S. C. sec. 301, states that:

> Whenever the Secretary of the Interior shall deem it to be consistent with the public interest he is authorized to lease deposits of oil and gas in or under lands embraced in railroad or other rights of way acquired under any law of the United States, whether the same be a base fee [e. g. Northern Pacific right-of-way?] or a mere easement [e. g. Great Northern right-of-way?] * * *

While this 1930 statute loses some of its probative value by reason of the fact that it was enacted 55 years after the 1875 Act was passed and also because it may have been influenced by the dictum in the *Stringham* case, we submit that the 1906 statutes are subject to no such infirmities. Especially are these earlier statutes pertinent since they are approximately contemporaneous with the acquisition by the Great Northern and its predecessor of large segments of its present right of way. See Record pp. 4, 7; see also, *Taggart* v. *Great Northern Ry. Co.*, 208 Fed. 455, 457 (E. D. Wash.), affirmed 211 Fed. 288 (C. C. A. 9). Statutes enacted between the time a grant is made and the time it takes effect may be considered in

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[21] H. Rept. No. 4777, 59th Cong., 1st Sess., p. 2 (Ser. No. 4908); cf. Sen. Rept. No. 1417, 59th Cong., 1st Sess., p. 2 (Ser. No. 4904).

determining the scope of the original grant. *Northern Pacific Railway* v. *Soderberg*, 188 U. S. 526, 533–534. And this is true even though the subsequent statutes modify the original grant, which is not the fact in the instant case. Hence, if the phrase "right of way" was theretofore ambiguous, the 1906 statutes remove the ambiguity and make it clear that the 1875 Act granted an easement and nothing more.[32]

D. *Summary.*—In short, the language of the 1875 Act with its "subject to" proviso, when read in connection with the legislative purpose of the statute and the then prevailing congressional land-grant policy, and when viewed in the light of its subsequent administrative and legislative construction, establishes that the Act should also be construed by the courts as granting the railroads an easement rather than a fee in their rights of way. If the foregoing analysis of the 1875 statute be correct, it will follow as of course that the subsurface minerals were not conveyed to the railroads.

Petitioner in advancing the contrary contention relies for the most part upon a series of decisions of this Court (Pet. 29–33) arising under the railroad right of way and land grants of 1850–1871. Petitioner urges that, since the 1875 Act is sub-

[32] In addition, as we have noted above (*supra*, p. 26, n. 29) there has been an implied legislative endorsement of the administrative construction by virtue of partial reenactment.

stantially identical to the pre-1871 grants, it should be identically construed (Pet. 34–36).

None of these cases involved the issue whether the railroads' rights, whatever their precise nature, include title to subsurface minerals.[33] And in any event, we submit that petitioner's argument based on these cases fails because it disregards the essential differences between the 1875 Act and its predecessors. These differences rest, as we have noted, in the distinctive language of the 1875 grant (*supra*, pp. 10–12) and in the sharp change in congressional land-grant policy in 1871 (*supra*, pp. 15–19). No provision comparable to the "subject to" clause of Section 4 of the 1875 Act is to be found in the land-grant acts of 1850–1871; its appearance coincides with the establishment of the new legislative policy.[34]

But even if the language of the 1875 Act were identical with that of the 1850–1871 grants, which it is not, the legislative background warrants a con-

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[33] Petitioner states (Pet. 4, 29) that *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, "involved a question whether the railway company could enjoin the removal of minerals underlying its [granted] right of way strip." The railroad had, however, instituted a suit to quiet title to its right of way; the defendant's claim to the land derived solely from his purchase of *surface* rights from a placer mine patentee. See *infra*, pp. 32–33.

[34] The "subject to" provision first appeared in the Portland, Dallas and Salt Lake right of way Act of April 12, 1872, 17 Stat. 52.

struction of the 1875 Act different from the earlier grants. For it is plain, and this Court has so held,[35] that the meaning of words in a grant varies according to the time and circumstances of their utterance. And, as we have pointed out (*supra*, pp. 15–19), the time and circumstances of the 1875 grant were in sharp contrast to those of the grants between 1850 and 1871.

It is true that this Court in *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, 47, stated that the interest granted by the Act of 1875 was "neither a mere easement, nor a fee simple absolute, but a limited fee." But that statement was not necessary to the decision and is not decisive of the instant

[35] An unreserved grant of swamp land has been held to include a grant of mineral lands (*Work* v. *Louisiana*, 269 U. S. 250), while an unreserved grant of school lands was held not to pass title to mineral lands lying in the section described in the grant (*United States* v. *Sweet*, 245 U. S. 563). The Court in *Work* v. *Louisiana* expressly distinguished the *Sweet* case on the ground that at the time of the grant there in controversy, there was a settled congressional policy of reserving mineral lands, while there was no such settled policy at the time of the grant considered in *Work* v. *Louisiana* (pp. 258–259). The Court also distinguished the *Sweet* case on the ground that there was, in respect of the grant involved in *Work* v. *Louisiana*, no settled departmental construction of the swamp land Acts and no subsequent congressional interpretation (p. 259). Both these factors are present in the instant case (*supra*, pp. 21–29). And compare the *Sweet* case with *Cooper* v. *Roberts*, 18 How. 173, where the grant of school lands was held to pass title to mineral lands. Here again, the Court distinguished identical grants in part on the ground of a shift in legislative policy. See the *Sweet* case at p. 574. Cf. *Northern Pacific Railway* v. *Soderberg*, 188 U. S. 526, 533–534.

case. In the *Stringham* case, the plaintiff railroad brought suit to quiet title to a strip of land acquired by it under the 1875 Act. Defendants asserted title to the same strip of land by virtue of a purported purchase of surface rights from a placer mine claimant. *Rio Grande Ry.* v. *Stringham,* 38 Utah 113, 116, 110 Pac. 868. 869–870 (1910). The Supreme Court of Utah reversed the judgment of the trial court, and remanded the case with a direction "to enter a judgment awarding to the plaintiff title to a right of way over the lands in question." The trial court accordingly entered judgment declaring plaintiff to be the owner of the right of way. The plaintiff again appealed, asserting that it should have been adjudged "owner in fee simple of the right of way over the premises." *Rio Grande Ry.* v. *Stringham,* 39 Utah 236, 115 Pac. 967 (1911). The Supreme Court of Utah affirmed the judgment of the trial court on the ground that the plaintiff should have sought its remedy by petitioning for a rehearing of the earlier case. The plaintiff thereupon brought up both judgments to this Court by writ of error. This Court held that the writ of error addressed to the second judgment presented nothing reviewable (p. 47). It affirmed the first judgment since it "describes the right in the exact terms of the Right-of-Way Act and evidently uses those terms with the same meaning they have in the act" (p. 48).

It is, therefore, clear that the issue now before this Court was not squarely presented in the *Stringham* case, since the defendant claimed only a surface right which conflicted with the plaintiff's surface right, and since, further, the only issue before this Court was the accuracy of the language utilized in the first judgment. And, in any event, this Court's conclusion that the plaintiff was owner of a "limited fee" was based (p. 47) entirely on cases arising under the land-grant acts passed prior to 1871 and containing no requirement that the lands "over which" the right of way passed should thereafter be disposed of "subject to such right of way." These important differences in the land grant acts and the Right of Way Act were not called to the Court's attention.[16] No brief was filed by the defendant in that case, by the United States or by the other owners of land crossed by these rights of way (p. 45).

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[16] In this connection it is worth noting that in two early cases decided at a time when the 1871 change in legislative policy was a matter of common knowledge, this Court described two similar Acts as merely granting an easement. For example, in *Railway Co.* v. *Alling*, 99 U. S. 463, 475 (1878), it was held that the Act of June 8, 1872, c. 354, 17 Stat. 339, granted to the Denver and Rio Grande Railway Company "a present beneficial easement." Chief Justice Waite, in a dissenting opinion (p. 482), described it as "no more than a license to enter upon and use" the unappropriated public lands. In *Smith* v. *Townsend*, 148 U. S. 490, 498–499, the Court declared that the Southern Kansas Railway Company and its successors, under the Act of July 4, 1884, c. 179, 23 Stat. 73, "had simply an easement, not

In these circumstances we submit that the statement in the *Stringham* case is not controlling.[37] And the question is one of sufficient importance to the railroads, to the Government, and to the other owners of lands crossed by these rights of way to warrant an examination *de novo*.

No settled rule of property will be disturbed by a repudiation of the dictum in the *Stringham* case. In fact, as we have shown (*supra*, pp. 21–25), a decision construing the 1875 Act as granting an easement rather than a fee will merely restore a rule of property which existed between 1875 and 1915. And since it was during that period that the Great Northern Railway Company acquired its present

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a fee in the land", that "the fee continued in the Indians," "all that the company received was a mere right-of-way", and that "doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract *subject to the easement of the company;* and if ever the *use* of that right of way was abandoned by the railroad company the *easement* would cease, and the *full title* to that right-of-way would vest in the patentee of the land." Such statements, made by this Court as early as 1878, refute petitioner's contention "that prior to and during the period of the Congressional grants, the idea that a railroad might be built upon an easement had hardly been thought of" (Pet. 13). See also *East Alabama Railway Company* v. *Doe*, 114 U. S. 340, 350 (1885); *Hazen* v. *Boston and Maine Railroad*, 2 Gray 574, 580 (1854); *Blake* v. *Rich*, 34 N. H. 282, 283–284, 288–289 (1856).

[37] In two subsequent cases where the 1875 grant is described as a limited fee, the statements are merely dicta based on the *Stringham* case. *Choctaw, O. & G. R. R. Co.* v. *Mackey*, 256 U. S. 531, 538; *Noble* v. *Oklahoma City*, 297 U. S. 481, 494.

right of way, no hardship is wrought upon the Railroad if the construction that the grant conveyed an easement rather than a fee be reaffirmed.

II

EVEN IF THE RIGHT OF WAY IS A "LIMITED FEE," IT DOES NOT FOLLOW THAT THE RAILROAD OWNS THE MINERALS

We have urged (*supra*, pp. 32–35) that this Court's statement in the *Stringham* case that the right of way granted in the 1875 Act is a "limited fee" on an implied condition of reverter be not regarded as decisive of the instant case. But even adherence to that definition of the right of way does not impel the conclusion that such a "fee" includes the right to extract oil and minerals. The expression "limited fee" may be used to describe the *duration* of a particular estate or interest (e. g. the duration of an *easement*), or it may be employed to describe the *use* to which an estate may be put (e. g. "for church purposes only").

In none of its decisions has this Court defined the term "limited fee."[38] But the Circuit Court of Appeals for the Eighth Circuit, in *United States* v. *Big Horn Land & Cattle Co.*, 17 F. (2d) 357, has construed these words as defining the *duration* of the *easement*. That court, after adverting to a similar statement by Justice Van Devanter in *Kern River Co.* v. *United States*, 257 U. S. 147, 152,

[38] Nor has the Court, as we have pointed out (*supra*, p. 30), determined the issue whether whatever the nature of the railroad's interest, the grant includes title to subsurface minerals.

that the "right of way intended by the [Canal and Reservoir Right of Way] act was neither a mere easement nor a fee simple absolute, but a *limited fee* on an implied condition of reverter," said (p. 365):

> Of course it is clear that Mr. Justice Van Devanter used the expression "mere easement" in its restricted sense, implying little more, if any, than a license, for it is well settled that an easement may include a fee * * *.
>
> A *fee* may exist in an incorporeal hereditament, and may, of course, under this principle, exist in an *easement.* * * * *Branson* v. *Studabaker,* 133 Ind. 147, 165, 33 N. E. 98.
>
> We think it, therefore, not important whether the interest or estate passed be considered an easement or a limited fee. In any event it is a limited fee in the nature of an easement.

It is well settled that an easement may be held in fee determinable. 2 Tiffany, *Real Property* (2d ed. 1920), p. 1228; 1 Washburn, *Real Property* (6th ed. 1902), sec. 146, p. 74; Jones, *Easements* (1898) sec. 16, p. 14; *Hall* v. *Turner,* 110 N. C. 292, 304, 14 S. E. 791 (1892); *Oswald* v. *Wolf,* 126 Ill. 542, 548, 19 N. E. 28 (1888); *Branson* v. *Studabaker,* 133 Ind. 147, 164, 33 N. E. 98 (1892); *Nellis* v. *Munson,* 108 N. Y. 453, 461, 15 N. E. 739 (1888).

The mere fact that the right of way has some of the attributes of a fee—"perpetuity and exclu-

sive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property"—does not require the conclusion that the right of way is not an easement. *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 183; *Western Union Tel. Co.* v. *Pennsylvania R. R.*, 195 U. S. 540, 570. The purposes of Congress are accomplished if the grant is held to be a "fee" in the surface and so much of the subsurface as is necessary for support—a "fee" for a railroad thoroughfare exclusively. Since such an interest would accomplish the purposes of Congress, this is the largest interest which the applicable rules of construction will permit to pass under the Act (*supra*, pp. 12–15). Under such a construction the Railroad is restricted in the use of the land except as a railroad thoroughfare. The right to use and extract minerals is a use of the land not permitted to the railroad. *Union Missionary Baptist Church* v. *Fyke*, 179 Okla. 102 (1937); *Jordan* v. *Goldman*, 1 Okla. 406, 453 (1891).

Hence, even though the Act be construed as granting the railroads a "limited fee" in their rights of way, it does not follow that the railroads acquired any rights in the subsurface minerals.

CONCLUSION

If the Right of Way Act of March 3, 1875, be construed as granting the railroads an easement rather than a fee in their rights of way, which we believe to be the correct construction, it necessarily

follows that these railroads have no right, title, or interest in the minerals underlying their rights of way. Even if the Act be construed as granting the railroads a limited fee in their rights of way, this "fee" does not include subsurface minerals. It therefore follows that the judgment of the court below should be affirmed.

Respectfully,

CHARLES FAHY,
Solicitor General,
NORMAN M. LITTELL,
Assistant Attorney General,
VERNON L. WILKINSON,
RICHARD S. SALANT,
Attorneys.

JANUARY 1942.

APPENDIX

Act of March 3, 1875, c. 152, 18 Stat. 482, 43 U. S. C., secs. 934–939:

CHAP. 152. An act granting to railroads the right of way through the public lands of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

SEC. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any

other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: Provided, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

SEC. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

SEC. 4. That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

SEC. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved, March 3, 1875.

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

No. 149.—October Term, 1941.

Great Northern Railway Company, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 2, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

We are asked to decide whether petitioner has any right to the oil and minerals underlying its right of way acquired under the general right of way statute, Act of March 3, 1875, c. 152, 18 Stat. 482.

The United States instituted this suit to enjoin petitioner from drilling for or removing gas, oil and other minerals so situated, and alleged in its complaint substantially that petitioner, in 1907, acquired from the St. Paul, Minneapolis and Manitoba Railway all of the latter's property, including rights of way granted it under the Act of March 3, 1875, a portion of which crosses Glacier County, Montana; that petitioner acquired neither the right to use any portion of such right of way for the purpose of drilling for or removing subsurface oil and minerals, nor any right, title or interest in or to the deposits underlying the right of way, but that the oil and minerals remained the property of the United States; and, that although no lease had been issued to petitioner under the Act of May 21, 1930, 46 Stat. 373, petitioner claimed ownership of the oil and minerals underlying its right of way and threatened to use the right of way to drill for and remove subsurface oil.

Petitioner admitted certain allegations of fact, denied the allegation that title to the oil and minerals was in the United States, and asserted that it proposed to drill three separate oil wells—the oil from the first to be sold commercially, that from the second to be refined, the more volatile parts to be sold and the residue to be used on petitioner's locomotives, and that from the third to be used in its entirety by petitioner as fuel.

Pursuant to a motion therefor by the United States, judgment was rendered on the pleadings and petitioner was enjoined from "using the right of way granted under the Act of March 3, 1875,

18 Stat. 482, for the purpose of drilling for or removing oil, gas and minerals underlying the right of way". The Circuit Court of Appeals affirmed. 119 F. 2d 821. The importance of the question and an asserted conflict with *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, moved us to grant certiorari. 314 U. S. —.

The Act of March 3, 1875, from which petitioner's rights stem, clearly grants only an easement, and not a fee. Section 1 indicates that the right is one of passage since it grants "the", not a, "right of way through the public lands of the United States". Section 2 adds to the conclusion that the right granted is one of use and occupancy only, rather than the land itself, for it declares that any railroad whose right of way passes through a canyon, pass or defile "shall not prevent any other railroad company from the *use and occupancy* of said canyon, pass, or defile, for the purposes of its road, *in common* with the road first located".[1]

Section 4 is especially persuasive. It requires the location of each right of way to be noted on the plats in the local land office, and "thereafter all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way".[2] This reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee. As the court below pointed out, "Apter words to indicate the intent to convey an easement would be difficult to find". That this was the precise intent of Section 4 is clear from its legislative history.[3] While Section 4 provides a method for securing the benefits of the Act in advance of construction,[4] no adequate reason is advanced for believing that it does not illumine the nature of the right granted. The Act is to be interpreted as a harmonious whole.

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[1] Emphasis added.

[2] Emphasis added.

[3] This clause first appeared in a special right of way statute, Portland, Dalles, and Salt Lake Act of April 12, 1872, 17 Stat. 52. Congressman Slater reported that bill for the Public Lands Committee, and, in discussing the reason for the clause, said:

> Mr. SLATER: The point [of this clause] is simply this: the land over which this right of way passes is to be sold subject to the right of way. It simply provides that this right of way shall be an incumbrance upon the land for one hundred feet upon each side of the line of the road; that those who may afterward make locations for settlement shall not interfere with this right of way.
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> Mr. SPEER of Pennsylvania: It grants no land to any railroad company?
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> Mr. SLATER: No, sir. [Cong. Globe, 42d Cong., 2d Sess., 2137 (1872).]

[4] The right of way may be located by construction. Dakota C. R. Co. v. Downey, 8 L. D. 115; Jamestown and Northern Rd. Co. v. Jones, 177 U. S. 125; Stalker v. Oregon Short Line, 225 U. S. 142.

The Act is to be liberally construed to carry out its purposes. *nited States* v. *Denver, &c. Railway,* 150 U. S. 1, 14; *Nadeau* v. *nion Pacific R. R. Co.,* 253 U. S. 442; *Gt. Northern Ry.* v. *Steinke,* 61 U. S. 119. But the Act is also subject to the general rule of onstruction that any ambiguity in a grant is to be resolved fav- rably to a sovereign grantor—"nothing passes but what is con- eyed in clear and explicit language"—*Caldwell* v. *United States,* 50 U. S. 14, 20-21, and cases cited. Cf. *Gt. Northern Ry.* v. *teinke, supra.* Plainly there is nothing in the Act which may be haracterized as a "clear and explicit" conveyance of the under- ying oil and minerals. The Act was designed to permit the con- truction of railroads through the public lands and thus enhance heir value and hasten their settlement. The achievement of that urpose does not compel a construction of the right of way grant s conveying a fee title to the land and the underlying minerals; railroad may be operated though its right of way be but an asement.[5]

But we are not limited to the lifeless words of the statute and ormalistic canons of construction in our search for the intent of Congress. The Act was the product of a period, and, "courts, in onstruing a statute, may with propriety recur to the history of he times when it was passed". *United States* v. *Union Pacific R. R. Co.,* 91 U. S. 72, 79. And see *Winona & St. Peter RR. Co. . Barney,* 113 U. S. 618, 625; *Smith* v. *Townsend,* 148 U. S. 490, 494; *United States* v. *Denver, &c. Railway,* 150 U. S. 1, 14.

Beginning in 1850 Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain.[6]

[5] In Railway Co. *v.* Alling, 99 U. S. 463; and Smith *v.* Townsend, 148 U. S. 490, statutory rights of way were held to be but easements. And, it has been held that railroads do not have a fee in those portions of their rights of way acquired by eminent domain proceedings. See East Alabama Railway Company *v.* Doe, 114 U. S. 340; Quick *v.* Taylor, 113 Ind. 540; Railroad Co. *v.* Schmuck, 69 Kan. 272; Keown *v.* Brandon, 206 Ky. 93; Hall *v.* Boston & Maine Railroad, 211 Mass. 174; Roberts *v.* Sioux City & P. R. Co., 73 Nebr. 8; Washington Cemetery *v.* P. P. & C. I. R. R. Co., 68 N. Y. 591.

[6] Typical were the Illinois Central Grant, Act of September 20, 1850, c. 61, 9 Stat. 466; Union Pacific Grant of July 1, 1862, c. 120, 12 Stat. 489; Amended Union Pacific Grant, Act of July 2, 1864, c. 216, 13 Stat. 356; and Northern Pacific Grant, Act of July 2, 1864, c. 217, 13 Stat. 365. This last grant was the largest, involving an estimated 40,000,000 acres. In view of this lavish policy of grants from the public domain it is not surprising that the rights of way conveyed in such land-grant acts have been held to be limited fees. Northern Pacific Ry. Co. *v.* Townsend, 190 U. S. 267. Cf. Missouri, Kansas & Texas Ry. Co. *v.* Roberts, 152 U. S. 114.

This policy incurred great public disfavor[7] which was crystallized in the following resolution adopted by the House of Representatives on March 11, 1872:

"*Resolved*, That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law." Cong. Globe, 42d Cong., 2d Sess., 1585 (1872).

After 1871 outright grants of public lands to private railroad companies seem to have been discontinued.[8] But, to encourage development of the Western vastnesses, Congress had to grant rights to lay track across the public domain, rights which could not be secured against the sovereign by eminent domain proceedings or adverse user. For a time special acts were passed granting to designated railroads simply "the right of way" through the public lands of the United States.[9] That those acts were not intended to convey any land is inferable from remarks in Congress by those sponsoring the measures. For example, in reporting a bill granting a right of way to the Dakota Grand Trunk Railway (17 Stat. 202), the committee chairman said: "This is merely a grant of the right of way".[10] Likewise, in reporting a right of way bill for the New Mexico and Gulf Railway Company (17 Stat. 343), Mr. Townsend of Pennsylvania, the same Congressman who sponsored the Act of 1875, observed: "It is nothing but a grant of the right of way".[11]

The burden of this special legislation moved Congress to adopt the general right of way statute now before this Court. Since it was a product of the sharp change in Congressional policy with respect to railroad grants after 1871, it is improbable that Congress intended by it to grant more than a right of passage, let alone min-

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[7] See "Land Grants", 9 Encyclopedia of the Social Sciences (1933), p. 35; "Land Grants to Railways", 3 Dictionary of American History (1940), p. 237.

[8] *Ibid.* And see H. Rept. No. 10, 43d Cong., 2d Sess. (1874), p. 1 (Ser. No. 1656) recommending that a bill to grant lands to aid in the construction of a railroad not pass. See also the remarks of Mr. Dunnell in reporting a special right of way bill for the Public Lands Committee, Cong. Globe, 42d Cong., 2d Sess., 2543 (1872), and those of Mr. Townsend, who was in charge of the bill which became the Act of 1875, in reporting to the House the Senate bill and the House substitute. Cong. Rec., 43d Cong., 2d Sess., Vol. 3, pt. 1, 404 (1875).

[9] The Forty-second and Forty-third Congresses (1871-1875) passed at least fifteen such acts.

[10] Cong. Globe, 42d Cong., 2d Sess., 3913 (1872).

[11] Cong. Globe, 42d Cong., 2d Sess., 4134 (1872). See also p. 2543.

ral riches. The presence in the Act of Section 4, which, as has een pointed out above, is so inconsistent with the grant of a fee, trongly indicates that Congress was carrying into effect its changed olicy regarding railroad grants.[12]

Also pertinent to the construction of the Act is the contemoraneous administrative interpretation placed on it by those harged with its execution. Cf. *United States* v. *Johnson,* 124 . S. 236, 253; *United States* v. *Moore,* 95 U. S. 760, 763; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315. The first such nterpretation, the general right of way circular of January 13, 888, was that the Act granted an easement, not a fee.[13] The same osition was taken in the regulations of March 21, 1892, 14 L. D. 38, and those of November 4, 1898, 27 L. D. 663. While the first f these circulars followed the Act by 13 years, the weight to be ecorded them is not dependent or strict contemporaneity. Cf. *wendig* v. *Washington Co.,* 265 U. S. 322. This early adminstrative gloss received indirect Congressional approval when Conress repeated the language of the Act in granting canal and reseroir companies rights of way by the Act of March 3, 1891, c. 561, 6 Stat. 1101, and when Congress made the Act of 1875 partially pplicable to the Colville Indian Reservation by Act of March 6, 896, c. 42, 29 Stat. 44. Cf. *National Lead Co.* v. *United States,* 52 U. S. 140, 146.

The circular of February 11, 1904, 32 L. D. 481, described the ight as a "base or qualified fee". This shift in interpretation as probably due to the description in *Northern Pacific Ry.* v. *'ownsend,* 190 U. S. 267, of a right of way conveyed in a landrant act (13 Stat. 365) as a "limited fee, made on an implied ondition of reverter".[14] But the earlier view was reasserted in he departmental regulations of May 21, 1909, 37 L. D. 787.[15] fter 1915 administrative construction bowed to the case of *Rio*

[12] See note 3, *ante.*

[13] "The act of March 3, 1875, is not in the nature of a grant of lands; does not convey an estate in fee, either in the 'right of way' or the grounds lected for depot purposes. It is a right of use only, the title still remaining the United States. . . . .

"All persons settling on public lands to which a railroad right of way has tached, take the same subject to such right of way and must pay for the ll area of the subdivision entered, there being no authority to make deducons in such cases." 12 L. D. 423, 428.

[14] See note 6, *ante.*

[15] The decisions of the Lands Department construing the 1875 Act are in cord. Fremont, Elkhorn and Missouri Valley Ry. Co., 19 L. D. 588; ary G. Arnett, 20 L. D. 13.; John W. Wehn, 32 L. D. 33; Grand Canyon r. Co. v. Cameron, 35 L. D. 495.

Grande Ry. v. *Stringham*, 239 U. S. 44, which applied the language of the *Townsend* case to a right of way acquired under the Act of 1875. We do not regard this subsequent interpretation as binding on the Department of the Interior since it was impelled by what we regard as inaccurate statements in the *Stringham* case. Cf. *Helvering* v. *Hallock*, 309 U. S. 106, 121.

Congress itself in later legislation has interpreted the Act of 1875 as conveying but an easement. The Act of June 26, 1906, c. 3550, 34 Stat. 482, declaring a forfeiture of unused rights of way, provides in part that: "the United States hereby resumes the full title to the lands covered thereby [by the right of way] freed and discharged from such easement". This language is repeated in the forfeiture act of February 25, 1909, c. 191, 35 Stat. 647. Also on June 26, 1906, an act[16] was passed confirming the rights of way which certain railroads had acquired under the 1875 Act in the Territories of Oklahoma and Arizona. The House committee report on this bill said: "The right as originally conferred and as proposed to be protected by this bill simply grants an easement or use for railroad purposes. Under the present law whenever the railroad passes through a tract of public land the entire tract is patented to the settler or entryman, subject only to this easement".[17] It is settled that "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309. See also *Cope* v. *Cope*, 137 U. S. 682; *United States* v. *Freeman*, 3 How. 556. These statutes were approximately contemporaneous with petitioner's acquisition of the rights of way of the St. Paul, Minneapolis and Manitoba Railway.

That petitioner has only an easement in its rights of way acquired under the Act of 1875 is therefore clear from the language of the Act, its legislative history, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments.

Petitioner, seeking to obviate this result, relies on several cases in this Court stating that railroads have a "limited", "base", or "qualified" fee in their rights of way.[18] All of those cases, except

[16] 34 Stat. 481.

[17] H. Rept. No. 4777, 59th Cong., 1st Sess., p. 2 (Ser. No. 4908); cf. S. Rept. No. 1417, 59th Cong., 1st Sess., p. 2 (Ser. No. 4904).

[18] Butts v. Northern Pacific Railroad, 119 U. S. 55; Clairmont v. United States, 225 U. S. 551; Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S. 114; M. K. & T. Ry. v. Oklahoma, 271 U. S. 303; New Mexico v. United States Trust Co., 172 U. S. 171; Northern Pacific Ry. v. Townsend, 190 U. S.

Rio Grande Ry. v. *Stringham*, 239 U. S. 44, *Choctaw, O. & G. R. R. Co.* v. *Mackey*, 256 U. S. 531; and *Noble* v. *Oklahoma City*, 297 U. S. 481, deal with rights of way conveyed by land-grant acts before the shift in Congressional policy occurred in 1871. For that reason they are not controlling here.[19] When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act. And, in none of those acts was there any provision comparable to that of Section 4 of the 1875 Act that "lands over which such right of way shall pass shall be disposed of subject to such right of way". None of the cases involved the problem of rights to subsurface oil and minerals.

In the *Stringham* case it was said that a right of way under the Act of 1875 is "neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee". The railroad had brought suit to quiet title to a portion of its right of way. Stringham asserted title to that portion by virtue of a purported purchase of surface rights from a placer mine claimant. The Supreme Court of Utah reversed the judgment of the trial court and remanded the case, directing the entry of "a judgment awarding to the plaintiff title to a right of way over the lands in question". 38 Utah 113; 110 P. 868. The railroad again appealed, asserting that it should have been adjudged "owner in fee simple of the right of way over the premises". The Supreme Court of Utah affirmed the judgment of the trial court on the ground that the railroad's proper remedy was by petition for rehearing of the first appeal. 39 Utah 236, 115 P. 967. Both judgments were brought to this Court by writ of error. It was held that the second judgment presented nothing reviewable. The first judgment was affirmed since it "describes the right of way in the exact terms of the right-of-way act, and evidently uses those terms with the same meaning they have in the act."

The conclusion that the railroad was the owner of a "limited fee" was based on cases arising under the land-grant acts passed

267; United States v. Michigan, 190 U. S. 379; Northern Pacific Railway Co. v. Ely, 197 U. S. 1; Rio Grande Ry. v. Stringham, 239 U. S. 44; Choctaw, O. & G. R. R. Co. v. Mackey, 256 U. S. 531; Noble v. Oklahoma City, 297 U. S. 481.

[19] See note 6, *ante*.

prior to 1871 and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention.[20] That conclusion is consistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling. Statements in *Choctaw, O. & G. R. R. Co.* v. *Mackey*, 256 U. S. 531, and *Noble* v. *Oklahoma City*, 297 U. S. 481, that the 1875 Act conveyed a limited fee are dicta based on the *Stringham* case and entitled to no more weight than the statements in that case. Far more persuasive are two cases involving special acts granting rights of way, passed after 1871 and rather similar to the general act of 1875.[21] *Railway Co.* v. *Alling*, 99 U. S. 463, characterized the right so granted as "a present beneficial easement" and *Smith* v. *Townsend*, 148 U. S. 490, referred to it as "simply as an easement, not a fee". We think that the Act of 1875 is to be similarly construed.

Since petitioner's right of way is but an easement, it has no right to the underlying oil and minerals. This result does not freeze the oil and minerals in place. Petitioner is free to develop them under a lease executed pursuant to the Act of May 21, 1930, 46 Stat. 373.

During the argument before this Court it was fully developed that the judgment was rendered on the pleadings in which petitioner denied the allegation of title in the United States, and there was no proof or stipulation that the United States h any title. On this state of the record the United States was not enitled to any judgment below. However, we permitted the parties to cure this defect by a stipulation showing that the United States has retained title to certain tracts of land over which petitioner's right of way passes, in a limited area,[22] and that petitioner intended to drill for and remove the oil underlying its right of way over each of those tracts. Accordingly the judgment will be modified and limited to the areas described in the stipulation. As so modified, it is

Affirmed.

Mr. Justice ROBERTS and Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[20] No brief was filed by the defendant or the United States.

[21] 17 Stat. 339; 23 Stat. 73.

[22] Lots 1, 2 and 3, Sec. 12; lots 1, 4, 5, 9 and 10, Sec. 13, T. 29 N., R. 15 W., Montana Meridian, all being within the exterior boundaries of the Glacier National Park; NW¼ SE¼ Sec. 28; NW¼ Sec. 29; NE¼ NW¼ Sec. 30; NE¼ Sec. 34, T. 32 N., R. 24 E., Montana Meridian.